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A HANDBOOK OF PRESCRIPTION

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PRESCRIPTION

ACCORDING TO

THE LAW OF SCOTLAND

BY

J. H. MILLAR

ADVOCATE

EDINBURGH

WILLIAM GREEN AND SONS

Law Publishers

1893

TO

THE RIGHT HONOURABLE

LORD MONCREIFF

SOMETIME LORD JUSTICE-CLERK

PREFACE

THIS little volume is based throughout upon the late Mr. Napier's copious and exhaustive *Commentaries on the Law of Prescription*, a work which must always be valuable as a repository of profound learning and ingenious argument, but which would, perhaps, have possessed greater practical utility had it been somewhat less diffuse. Many cases bearing upon the subject of Prescription have been decided during the forty years that have elapsed since Mr. Napier's book was published; and to most of these it is hoped that reference will be found in the following pages.

The accepted sources of doctrine and information have, of course, been freely drawn upon, and need not here be particularised. I am bound, however, to pay a special acknowledgment to that portion of his great work on *Landownership* in which Mr. Rankine has treated of the Positive Prescription. I have also to record my unfeigned gratitude to my friends Mr. Baillie and Mr. Blackburn for their kindness in undertaking, and their diligence in performing, the task of verifying the references; as well as for offering many valuable suggestions. It need scarcely be said that for all errors the author alone is responsible.

J. H. M.

1*st October* 1893.

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PART I

THE LONG PRESCRIPTION

(Stair, 2. 12. 1-27, and More's Note AA.)
(Erskine, *Inst.*, 3. 7. 1-15.)

CHAPTER I

THE STATUTES INTRODUCING PRESCRIPTION

Introductory.

Prescription—which originally signified any exception, but came latterly to be especially identified with the *exceptio ratione temporis*—is a plea which may be employed for the purpose either of extinguishing or of establishing a right of property. The manifest desirability of 'fixing and ascertaining property,' and of preventing forgeries, has procured it a place in the municipal code of all human societies. Whether, and to what extent, prescription was originally known to the common law of Scotland is a question which shall be briefly considered hereafter. (See *infra* p. 72.) But for almost all practical purposes it may be taken to be wholly the creature of statute; and it is, therefore, as unnecessary here to discuss the Roman law of prescription, to which that of Scotland owes little or nothing, as it is to enter upon the speculation whether prescription be 'repugnant to natural equity,' or, on the contrary, 'agreeable 'to the law of nature.'

Act 1469, c. 28.

The first Scots statute dealing with prescription is the Act 1469, c. 28, entitled, 'Of obligations to be followed within 'fortie zeir, or else prescrive.'

'Item, as anent Obligations, that sall be followed in time 'cumming, except them that are dependand in the law before the 'making of this act,—It is advised that the partie to quhome the 'obligations is maid, that has interest therein, sall follow the said 'obligation, within the space of fourtie zeires, and take document 'thereupon; and gif he dois not, it shall be prescrived, and be of 'nane availe, the said fourty zeires beand runnin, and unpersewed 'be the pairtie.'

Act 1474, c. 54.

This was soon followed by the Act 1474, c. 54, entitled 'Prescription of Obligations,' which was explanatory of the former enactment.

'Item, anentis the acte maid of before of prescription of 'Obligations: It is ordained to be understandin in this wise; 'that all auld obligations maid of before, that is elder then the 'date of fourtie zeires, not dependant in the law in the time of the 'making of the said actis, shall be prescribed, and of na strength: 'and in likewise in time to cum, all obligations maid, or to be 'maid, that beis not followed within fourtie zeiris, sall prescrive 'and be of nane availe.'

In course of time these acts came to be applied to all moveable rights and actions. So late, indeed, as 1622, the Act 1469, c. 28, was held not to affect an obligation for payment of an annual-rent in a marriage contract.[1] But this view was wisely departed from in two later cases,[2] and the Act has been held applicable to testaments,[3] to tutors' accounts,[4] to decreets though *in foro contradictorio*,[5] and to moveable subjects generally, *e.g.* a bell.[6]

Not applicable to heritage.

Wide, however, as was the interpretation put upon these Acts, their application was rigorously excluded from anything in the nature of an heritable right. An heritable title was found not to be affected by the statutes of obligations, and the same decision was pronounced in the case of a bond for the

[1] *Hamilton* v. *L. Sinclair*, 1622, M. 10, 717.

[2] *Lauder* v. *Colmslie*, 1630, M. 10, 655; *Ogilvy* v. *Ogilvy*, 1630, M. 10, 719.

[3] *Lindsays* v. *L. Balgony*, 1627, M. 10, 718.

[4] *A.* v. *B.*, 1618, M. 10, 717.

[5] Stair, 2. 12. 12; 1637, M. 10, 719.

[6] *Minister and Session of Aberscherder* v. *Minister and Parishioners of Gemrie*, 1633, M. 10, 972.

delivery of a reversion, '*quia fuit ejusdem naturae*.[1] Similarly, it was held that because an obligation and the bond thereof were heritable, '*et sapebant naturam hereditatis*,' they could not be comprehended under the Act 1469, c. 28.[2] Mere possession of a moveable subject unchallenged for forty years afforded a sufficient presumption of property. No written title was required. But 'possession of an immoveable subject, though 'for a century of years together does not create even a pre-'sumptive right to it. *Nulla sasina nulla terra*.'[3] The feudal proprietor, therefore, who failed to connect himself with the crown—in the complete progress of whose titles one link was missing—no matter for how many years he might have enjoyed peaceable and uninterrupted possession of his lands, was at the mercy of the forger, or of any one who could produce a perfect series of infeftments with their warrants reaching back to the original grant from the sovereign.

For the hardship involved in such a case, the Act 1594, c. 218 was designed to supply a remedy. Act 1594, c. 218.

'Our Sovereign Lord and Estates of this present Parliament 'understanding that sundry of his Highness's lieges are heritably 'infeft in divers lands and annual-rents within this Realm, likeas 'their predecessors and authors, from whom their rights thereof 'proceed, have been heritably infeft in the same lands and annual-'rents; and, by virtue of their several infeftment and liferents 'therein reserved, they, and their predecessors and authors, have 'bruiked (possessed) the foresaid lands and annual-rents by the 'space of forty years together: notwithstanding whereof, the said 'infeftments, made and granted to them and their predecessors 'and authors, are sundry times drawn in question, for laik and 'want of procuratories of resignation, instruments of resignation, 'precepts of *clare constat*, or other precepts of sasine, which are not 'extant to be produced and used, in respect the same are tynt '(lost) and amitted,—partly by iniquity of time,—partly by 'perishing of protocols, and scrolls of notaries,—partly for 'non-delivering of the same by the persons sellers, and disponers 'thereof, partly because the evidents of comprised lands use to be

[1] *Lord Cathcart* v. *Laird of Gad-zat*, 1585, M. 10, 716.

[2] *A* v. *B*, 1589, M. 10, 717.

[3] Ersk., Prin., 2. 1. 15.

'abstracted and withholden upon malice of parties,—and partly 'as evidents not thought necessary to have been kept after so long 'time, by reason that the charters make mention of the procura- 'tories and instruments of resignation, and instruments of sasine 'make mention of the precepts of sasine whereupon the same pro- 'ceed: For remedy whereof, our said Sovereign Lord, &c., finds, 'decerns, and declares, that none of his Highness lieges may be 'compelled, after the space of forty years, to produce procura- 'tories or instruments of resignation, precepts of *clare constat*, 'or other precepts of sasine of lands, or annual-rents, whereof the 'present heritable possessors, and their predecessors and authors, 'and other persons, by virtue of liferents reserved in the said 'infeftments, are, and were in possession by the space of forty 'years together; and that the wanting and in-laik thereof, nor 'none of them, shall be no cause of reduction of the infeftments 'granted to the proprietors, or their predecessors or authors, of 'the lands or annual-rents whereof the charter or charters (making 'mention of the resignation or resignations to have been made), and 'the instruments of sasine (making mention of the precepts of sasine 'by virtue of which the sasines were given) are extant. And wills, 'statutes and ordains, that this act shall be extended to all procura- 'tories and instruments of resignation, precepts of *clare constat*, or 'other precepts of sasine, the wanting and inlaik whereof, nor none 'of them, shall be no cause of reduction, nor other quarrel (question) 'whatsoever, after the space of forty years, where infeftments have 'taken effect by possession, by the said space of forty years, in 'manner above rehearsed, and where the charters and instruments 'of sasine are extant as said is.'

The production, then, of charter and instrument of sasine, and the possession of the lands by the space of forty years together were the conditions of a proprietor's freedom from the risk of having his title reduced or quarrelled; and this was, doubtless, a most important step towards putting heritable proprietors 'in certainty of their heritage in all time coming.' But that desirable object was not fully accomplished until the passing of 'that excellent statute of prescription,'[1] 'the palladium of our land proprietors,'[2] the Act 1617, c. 12, the text of which will be found in the next chapter.

[1] Stair, 4. 35. 15.

[2] Kames, *Eluc.*, p. 262.

CHAPTER II

THE ACTS 1617, c. 12; AND 37 AND 38 VICT. c. 94

THE Act 1617, c. 12, runs as follows:— Act 1617 c. 12.

'*Anent Prescription of Heritable Rights.*

'Our Sovereign Lord, considering the great prejudice which his 'Majesty's Lieges sustain in their Lands and Heritages, not only by 'the abstracting, corrupting, and concealing of their true evidents, in 'their minority and less-age, and by the amission thereof by the 'injury of time, through war, plague, fire, or such like occasions,— 'but also by the counterfeiting and forging of false evidents and 'writs, and concealing of the same to such a time that all means of 'improving thereof is taken away; whereby his Majesty's Lieges are 'constitute in a great uncertainty of their heritable rights, and 'divers pleas and actions are moved against them, after the expiry of 'thirty or forty years, which nevertheless by the Civil Law, and by 'the laws of all nations, are declared void and ineffectual; and his 'Majesty, according to his fatherly care which his Majesty hath to 'ease and remove the griefs of his subjects, being willing to cut off 'all occasion of pleas, and to put them in certainty of their heritage 'in all time coming,—Therefore his Majesty, with advice and con- 'sent of the Estates of Parliament, by the tenor of this present 'act, statutes finds and declares, that whosoever his Majesty's 'Lieges, their predecessors and authors, have brooked heretofore, 'or shall happen to brook in time coming,—by themselves, their 'tenants, and others having their rights,—their lands, baronies, 'annual rents, and other heritages, by virtue of their heritable 'infeftments made to them by his Majesty, or others their superiors 'and authors, for the space of forty years, continually and together, 'following and ensuing the date of their said infeftments, and that 'peaceably, without any lawful interruption made to them therein, 'during the said space of forty years; that such persons, their 'heirs and successors, shall never be troubled, pursued nor 'inquieted, in the heritable right and property of their said 'lands and heritages foresaid, by his Majesty, or others their 'superiors and authors, their heirs and successors, nor by any 'other person pretending right to the same by virtue of prior 'infeftments, public or private, nor upon no other ground,

'reason or argument, competent of law except for falsehood: 'Providing they be able to shew and produce a charter of the said 'lands, and others foresaid, granted to them, or their Predecessors, 'by their said superiors and authors, preceding the entry of the 'said forty years possession, with the instrument of sasine following 'thereupon: Or, where there is no charter extant, that they shew 'and produce instruments of sasine, one or more, continued and 'standing together for the said space of forty years, either 'proceeding upon retours, or upon precepts of *clare constat*: 'Which rights his Majesty, with advice and consent of the 'Estates foresaid, finds and declares to be good, valid, and suffi-'cient rights (being clad with the said peaceable and continual 'possession of forty years), without any lawful interruption, as 'said is, for brooking of the heritable right of the said lands, 'and others foresaid. And sicklike, his Majesty, with advice fore-'said, statutes and ordains, that all actions competent of the law, 'upon heritable bonds, reversions, contracts, or others whatsoever, 'either already made, or to be made after the date hereof, shall be 'pursued within the space of forty years after the date of the 'same; except the said reversions be incorporate within the 'body of the infeftments used and produced by the possessor of 'the said lands, for his title of the same, or registrated in the Clerk 'of Register's books; in the which case, seeing all suspicion of 'falsehood ceases most justly, the actions, upon the said reversions 'ingrossed and registered, ought to be perpetual: Excepting 'always, from this present act, all actions of warrandice, which 'shall not prescribe from the date of the bond, or infeftment, 'whereupon the warrandice is sought, but only from the date of 'the distress, which shall prescribe, it not being pursued within 'forty years, as said is. And sicklike it is declared, that in the 'course of the said forty years' prescription, the years of minority 'and less age shall no ways be counted, but only the years during 'the which the parties, against whom the prescription is used and 'objected, were majors and past twenty-one years of age. And 'his Majesty, being careful that no person, who hath any just 'claim, be prejudged of their actions by the prescription of forty 'years already run and expired before the date of this present act, 'hath, with advice foresaid, granted full liberty and power to them 'to intent their said actions, within the space of thirteen years, 'next following the date hereof; which shall be as effectual as if 'the same had been intented within the said space of forty years 'prescribed by this present act; after the expiring of the which 'thirteen years this present act shall have full force and effect, 'after the tenor thereof in all points. And nevertheless it is

'declared that the persons, at whose instance the foresaid actions shall 'be moved and intended within the said space of thirteen years, 'shall not be compelled to insist in the said actions, at the desire of 'their parties, upon the first summons and citation thereof only, 'except that the said first summons be called and continued, and 'the defenders of new summoned thereby; in the which case and 'no otherwise, it is declared that they may be compelled to insist 'at the instance of the party having interest.'

The series of prescriptive enactments is brought to a close by the Conveyancing Act of 1874 (37 and 38 Vict. c. 94), the 34th section of which is to this effect: 37 and 38 Vict. c. 94. § 34.

'Any *ex facie* valid irredeemable title to an estate in land 'recorded in the appropriate register of sasines shall be sufficient 'foundation for prescription, and possession following on such 'recorded title for the space of twenty years continually and 'together, and that peaceably, without any lawful interruption 'made during the said space of twenty years, shall, for all the 'purposes of the Act of the Parliament of Scotland, 1617, c. '12, "Anent prescription of heritable rights," be equivalent to 'possession for forty years by virtue of heritable infeftments for 'which charters and instruments of sasine or other sufficient titles 'are shown and produced, according to the provisions of the said 'Act; and if such possession as aforesaid following on an *ex facie* 'valid irredeemable title recorded as aforesaid shall have continued 'for the space of thirty years no deduction or allowance shall be 'made on account of the years of minority or less age of those 'against whom the prescription is used and objected, or of any 'period during which any person against whom prescription is 'used or objected was under legal disability. This enactment 'shall have no application to, and shall not be construed so as to 'alter or affect, the existing law relating to the character or period 'of the possession, use, or enjoyment necessary to constitute or 'prove the existence of any servitude or of any public right of 'way or other public right, [and shall not be pleadable to any 'effect in any action in dependence at the commencement of this 'Act, or which shall be commenced prior to the first day of 'January one thousand eight hundred and seventy-nine:] Pro- 'vided always, that the possession for any space of time prior to 'the first day of January one thousand eight hundred and seventy- 'nine shall not have effect for the purposes of this section unless 'such space of time immediately preceded and was continuous up 'to the said first day of January.'

Positive and Negative.

The Act 1617, c. 12, consists of two portions: one rendering invulnerable a certain specified written title, clothed with forty years' possession, in a competition for the right to heritable property; the other cutting off all actions upon heritable bonds, etc., not pursued within forty years. The plea of prescription may accordingly be proponed either (1) *positivé—i.e.* in terms of the first part of the Act; or (2) *negativé—i.e.* in terms of the second part of the Act (taken along with the Acts 1469, c. 28, and 1474, c. 54);[1] and since the beginning of last century the terms Negative and Positive Prescription have been freely employed. This nomenclature has led to serious confusion, but has long been so firmly established that its abandonment would now be attended with even greater inconvenience than its retention. In dealing, however, with the Positive and the Negative Prescription as distinct branches of the subject, it is essential to bear in mind that by the former is merely meant the plea as advanced under the first, or feudal, section, by the latter the plea as advanced under the second or general section of the statute.

[1] Stair, 4. 40. 20; *Innes of Auchluncart*, 1695, M. 11, 212.

CHAPTER III

OF THE POSITIVE PRESCRIPTION

(Stair, 2. 12. 15-27, and Note AA, pp. cclxxvi.-cclxxix.)
(Ersk., *Inst.*, 3. 7. 1-7) (Bell, *Prin.*, § 2002-2025)

Its functions.

The function of the Positive Prescription is twofold: (1) It secures the progress of titles to an estate against any one alleging a better title; (2) It determines the extent or comprehension of an estate, the title to which is not questioned. The essential conditions upon which the effective discharge of these functions depends are (1) a clear and distinct title; and (2) continued and unequivocal possession.

Its conditions: title and possession.

Given, then, the statutory title and the requisite possession referable to that title, the right of the party assailed is impregnable, even as against the Crown,[1] except on the ground of intrinsic nullity or forgery. It matters not that his infeftments have proceeded upon precepts from one who was not the true superior. Forty years' possession upon these infeftments will give a sufficient right to the subjects in question.[2] So exclusive is the nature of the prescriptive title that it will bar all inquiry into the previous origin and history of the title produced. 'Nullity from [extrinsic] error is not a relevant ground of 'objection to a prescriptive title.' 'The Positive Prescription 'operates by excluding all enquiry beyond the forty years into 'the previous titles and rights to the lands.' 'All the prior 'history of the lands is excluded.'[3] 'I hold,' says Lord

[1] Act 1617, c. 12; *Lord-Advocate* v. *Dundas*, 1830, 8 S. 755; 1831, 5 W. & S. 723.

[2] *Miller* v. *Dickson*, 1766, M. 10,937.

[3] *Forbes* v. *Livingstone*, 1827, 6 S. 167; 1 W. & S. 657.

Moncreiff,[1] 'that it is the purpose of prescription to exclude all 'enquiry as to whether titles habile in their form upon which 'prescriptive possession has followed were in their original nature 'good or bad, and specially the enquiry whether the author 'from whom they have proceeded had power to grant them 'or not. When prescription has run, there is an absolute pre-'sumption that they are good.' No enquiry into the *initium possessionis* is necessary or competent. A party having possessed an estate on a title from the Crown for more than forty years was held to have a prescriptive right to the subjects, though his title bore that the Crown, his author, had right only by virtue of the Act of Annexation, in which there was an express exception of the right of the Crown to the lands in question.[2] A proprietor had titles flowing from a subject superior in which his lands were described as 'bounded by the 'sea.' No crown-grant of the foreshore to that subject superior could be produced. The superior, therefore, had no right to the foreshore. Yet forty years' possession of the foreshore attributable to that grant *a non habente potestatem* was held sufficient to establish in the proprietor of the lands a prescriptive right of property in the foreshore.[3] It is, indeed, this 'very objection which 'it is the object and especial virtue of the long prescription to 'exclude' (p. Lord Young).[4] Where part of a barony was held of the Crown, and part of a subject-superior, and where after a judicial sale a purchaser resigned the whole lands in the hands of the Crown, and got a Crown charter, under which several successive heirs made up titles, ignoring the subject superior, and possessed for forty years, it was held in an action of reduction, improbation and declarator of non-entry raised by the subject superior, that the defender might plead prescription on the Crown charter clothed with possession, for that, though the

[1] *Lord-Advocate* v. *Graham*, 1844, 7 D. 183, 205.

[2] *Duke of Buccleuch* v. *Cunyng-hame*, 1826, 5 S. 53.

[3] *Young* v. *N. B. Ry. Coy.*, 1887, 14 R. H. L. 53; 1885, 13 R. 314.

[4] *Glen* v. *Scales' Trustees*, 1881, 9 R. 317.

feudal relation never terminated through mere non-user, there was no room for that doctrine in a case where possession was referable to a charter and sasine inconsistent with the feudal relation attempted to be set up.[1]

The same view was taken by the Lord Ordinary, in the unreported case of *Lockhart* v. *Duke of Hamilton and Others*, 1890, in which the pursuer challenged the right of the Duke of Hamilton to a superiority of teinds, and the right of Mr. Wolfe Murray to the *dominium utile* of the teinds, founded upon a grant (free of feu-duty) by the Duke of Hamilton, admittedly fortified by possession. 'It may be,' says Lord Kinnear in his Opinion, 'that prescriptive possession upon a 'charter *a non domino*, although it will give a good right to 'the grantee, may be unavailing to create an estate in the 'granter if he has no title in his own person to which he can 'ascribe the possession of his vassal. If that be so, the true 'superior may exclude the *non-dominus* from the *dominium* '*directum*. But that will not enable him to challenge, or in 'any way to affect, the right of the vassal which *ex hypothesi* 'has been established by prescriptive possession upon a habile 'title. For prescription operates not merely to secure the 'right of property, but to protect the title from question. . . . 'The extent and conditions of the right must be ascertained 'from the titles on which prescriptive possession has followed, 'and from no others. . . . It appears to me to be just as 'inconsistent with the settled law of prescription to say that 'by earlier titles the teinds were held in feu of the titular for 'payment of a feu-duty, as to say that the earlier titles would 'show that there had never been any good right to teinds in 'the heritor or his authors. . . . The defender is entitled to 'stand upon the grant which has now been fortified by his

[1] *Macdonald* v. *Lockhart*, 1853, 1 MacQ. 790; 25 S. J. 559.
See also *Duke of Buccleuch* v. *Boyd*, 1890, 18 R. 1; and *Duke of Roxburghe* v. *Scott*, 1871, 18 R. S.

'possession, and may refuse to look at any other title flowing 'from any other author.'

Good faith not required.

Bona fides, in short, is no element in the Positive Prescription. 'Even granting that the titles had been derived *a non* '*domino*, still the heir is entitled to plead prescription, whereby 'any enquiry into that fact or into *mala fides* is excluded' (p. Lord Balgray).[1] 'If the title be in itself perfectly good, and 'derived from the true proprietor, there can be no need of pre-'scription, which is only necessary to cure bad titles' (p. Lord P. Hope).[1] 'It is the great purpose of prescription to support 'bad titles. Good titles stand in no need of prescription' (p. Lord Braxfield).[2] If a party's title be such as may comprehend everything he claims under it, and prescriptive possession of the whole have followed, 'he cannot be called upon either to 'support that title or to contradict it by producing any older 'title or titles he may be possessed of. Nor can his position be 'varied for the worse by any production of older titles made by 'his opponent' (p. Lord Deas).[3] So a disposition and sasine *ex facie* absolute, clothed with possession for forty years, are sufficient to exclude an allegation that the right originally flowed from a title qualified by a power of redemption.[4]

Conditions must coincide.

But the two essentials, title and possession, *must* coincide, or prescription cannot operate. 'It is undoubted that simply '*non utendo* a feudal proprietor cannot lose his right of pro-'perty, or any of its consequents. Another party having a 'title may acquire an adverse right and interest through pos-'session upon a sufficient title. That is quite true: but there 'must be a title' (p. Lord Cowan).[5] A proprietor disponed a storey of a house to a purchaser in 1792. In 1793 he disponed the whole tenement gratuitously to his wife, who took infeftment upon the disposition in 1794. The purchaser and

[1] *Duke of Buccleuch* v. *Cunyng-hame*, 1826, 5 S. 53.

[2] *Scott* v. *Bruce Stewart*, 1779, M. 13. 519; 3 Ross L. C. 334.

[3] *Auld* v. *Hay*, 1880, 7 R. 663.

[4] *Chambers* v. *Law*, 1823, 2 S. 326.

[5] *Leck* v. *Chalmers*, 1859, 21 D. 408.

his heirs possessed the storey on the personal title without taking infeftment till 1837, when the heir of the purchaser was infeft. In 1862, a singular successor of the wife, who acquired his right in 1853 and was duly infeft, raised an action of removing against the heir of the purchaser, who pleaded prescription. Here, it will be observed, one party could point to an infeftment going back for more than forty years but without possession, while the other party could point to possession for more than forty years, but possession not referable to any infeftment. It was held that neither party had established an exclusive right, and that upon a consequent comparison of titles the heirs of the purchaser were to be preferred as standing in right of an onerous disponee.[1]

It is now necessary to consider somewhat more attentively the nature of the Title and of the Possession which are required by the Act 1617, c. 12. For convenience sake, we shall attempt, as far as possible, to discuss the two topics separately, though it is often difficult to keep them apart, and always undesirable to lose sight of their intimate connection.

[1] *Andersons* v. *Low*, 1863, 2 M. 100.

CHAPTER IV

OF THE PRESCRIPTIVE TITLE

Alternative titles.

Two titles are specified by the Act 1617, c. 12, as habile for prescription; one of which has been settled by practice to be that which is available to singular successors; the other to be that which is available to heirs.

Charter and sasine.

1. The first title is 'a charter of the said lands and others 'foresaids granted to them or their predecessors by their saids 'superiors and authors, preceding the entry of the saids forty 'years' possession, with the instrument of sasine following 'thereupon.' 'By charter,' says Lord Stair,[1] 'must not be 'understood a solemn charter as it is distinguished from a 'disposition or precept, but as it comprehends these, for many 'valid infeftments have no charter, but sasine proceeds upon 'the precept of sasine in the disposition.' The word 'charter,' indeed, may be said to be understood as comprehending any deed whose form of expression is considered legally dispositive —*e.g.* not merely a disposition, but a procuratory of resignation or a precept of sasine separate from a disposition or charter.[2] No authority can be found in support of Lord Stair's further proposition that an obligation to infeft with instrument of sasine will afford a good title for prescription.[3] But the Court is so desirous of putting a liberal construction upon the Act, that, in the opinion of at least one judge, an invalidly executed disposition of heritage by a proprietor, followed by a ratification by the heir apparent (which contained no words of

[1] 2. 12. 20.
[2] *Heriot's Hospital* v. *Hepburn*, 1697, M. 10, 787.
[3] 2. 12. 20.

conveyance) was equivalent to the disposition of that apparent heir, and therefore, though proceeding a *non habente protestatem*, was a habile title to found prescription.[1] A seisin of burgage-tenements bearing resignation to have been made in the hands of a bailie is a good foundation for a prescriptive right, the resignation and the sasine being contained in one instrument.[2] A charter restoring certain lands forfeited and annexed to the Crown under the Vesting and Annexing Acts, with infeftment following thereon, has been held a good title on which to prescribe an absolute right to an estate.[3] A sasine without its warrant is worthless as a title for prescription,[4] and of equally little value is a 'charter' unaccompanied by instrument of sasine.[5] The instrument of sasine is the *sine quâ non* of a prescriptive title to a feudal subject. 'Infeftment' may mean more than the instrument. It never can mean less. Extracts of sasine have been found not to be a title for prescription,[6] though a 'transumpt out of the official of Lothian's book' was held to be probative '*in re tam antiqua*';[7] though a charter of confirmation and new erection in favour of a Royal Burgh, narrating and confirming rights set forth as previously belonging to the Burgh, even if no sasine is produced, is a sufficient title for the magistrates to acquire a right of property upon;[8] and though, as we shall have occasion to see hereafter (*infra* p. 61), the statute is applied by analogy to cases where sasine is incompetent or unnecessary, and that in a very thoroughgoing manner.[9]

Sasine upon retours, etc.

2. The alternative title admitted by the Act is, 'Where 'there is no charter extant, instruments of sasine, one or

[1] *Glen* v. *Scales' Trustees*, 1881, 9 R. 317 (p. Lord Young).

[2] *Ker* v. *Abernethy*, 1705, M. 10, 813.

[3] *Glassford* v. *Mackenzie*, 1829, 7 S. 423.

[4] *Fraser* v. *Hogg*, 1679, M. 10, 784.

[5] *Ochterlony* v. *Officers of State*, 1825, 1 W. & S. 533.

[6] *Cumming* v. *Irving*, 1680, M. 10, 785.

[7] *Heriot's Hospital* v. *Hepburn*, 1697, M. 10, 787.

[8] *Aytoun* v. *Magistrates of Kirkcaldy*, 1833, 11 S. 676.

[9] *Maule* v. *Maule*, 1829, 7 S. 527.

'more, standing together for the said space of forty years, either 'proceeding upon retours, or upon precepts of *clare constat*.' The production of the retour or precept of *clare constat* upon which the sasine proceeds had been rendered unnecessary by the Act 1594, c. 218. They are merely referred to in the Act 1617, c. 12 to characterise the particular instrument of sasine which is to obtain the favour of being *probatio probata* of its own narrative without production of the dispositive writ of the granter. It must be the *ex facie* sasine of an heir. In *Earl of Argyle* v. *MacNaughton*[1] the Lords found 'that there was no 'necessity to produce or instruct that there was a precept or re-'tour otherwise than by the relation of the sasine.' In *Purdie* v. *Lord Torphichen*[2] an attempt to cut down an heir's title on the ground that infeftment was not taken upon the precept of *clare constat* till after the granter's death, failed in respect of the reply that the sasine being *ex facie* valid, the possessor was not bound to satisfy any farther production in support of his prescriptive right, the very intention of the statute being to remove all objections to the title other than that of falsehood. In *Munro* v. *Munro*[3] it was maintained, in view of the clause in the statute, 'if there is no charter extant,' that if there be a charter extant, the heir is bound to produce it. The Court, however, sustained the defender's contention that 'where the 'question is with heirs, it is enough to produce the infeftments 'and not the charter, even where the charter exists' (p. Lord Gillies). In cases where estates have descended to heirs for hundreds of years, if the pursuer's argument were good a party might come forward and insist for the production of the original charter. 'The charter is to be held as not extant '*quoad* all the world, if the defender does not choose to pro-'duce it. . . . I think we would strike at the root of the 'doctrine of exclusive title, if we were to go back and force 'parties to produce their charters, perhaps at the distance of

[1] 1671, M. 10, 791. [2] 1739, M. 10, 796. [3] 19 May 1812, F. C.

'centuries.' (p. Lord Meadowbank). Sasine by hasp and staple in a Royal Burgh is equivalent to sasine proceeding on a precept of *clare constat*.[1]

Production must be *ex facie* valid.

While the consideration of every step in the progress of titles is excluded save of what actually composes the prescriptive title, and while an *ex facie* nullity in a deed not required to be produced is of no consequence, whatever objection is suggested by, and can be urged by way of exception to, the production itself is invulnerable to prescription. The statutory production cannot be held to exclude itself. It must be an apparently good title. If it be *ex facie* vicious, it cannot be habile to found prescription. No lapse of time can cure what is in itself radically defective. *Tempus ex suâpte naturâ vim nullam effectricem habet.* 'No possession can make 'a title, by itself insufficient, a good title on which to pre-'scribe' (p. Lord Justice-Clerk Boyle).[2] Thus the want of a symbol in the delivery of sasine appearing in the instrument destroys it as a title. Or if a deed be not subscribed, or if it be tested by only one witness, or if there be a manifest contradiction on the face of the title (*e.g.* if the precept be to infeft one party, and the sasine bear that another party having no right has been infeft), these objections may be urged at any time by a pursuer, and constitute a valid answer to the plea of prescription. But if an extrinsic enquiry be necessary to determine whether a title be consistent with right, the plea that it is not consistent therewith fails as a reply to prescription. Thus where prescription was pleaded upon a charter of adjudication clothed with forty years' possession, it was held that the charter and sasine being liable to no apparent objection excluded all enquiry into nullities alleged to exist in the creditor's diligence which founded the investiture.[3] So an objection to a title on the ground that sasine had not been given on the lands was

[1] *Ker* v. *Abernethy*, 1705, M. 10,813.

[2] *Lord-Advocate* v. *Earl of Mansfield*, 1830, 8 S. 765.

[3] *Gedd* v. *Baker*, 1760, M. 10, 789.

held to be extrinsic. It might have had to be met within forty years, but not after they had expired.[1] The case where the granter of a precept is alleged to be *non habens potestatem* or the granter of a disposition *non dominus* has already been sufficiently discussed.

Registration of sasine.

The question whether the objection that a sasine has not been registered is fatal to that sasine as a prescriptive title gave rise at one time to considerable controversy, and Mr. Napier devotes several ingenious and plausible pages to a comparison of the Act 1617, c. 12, with the registration statute 1617, c. 16: whence he draws the conclusion that an unrecorded sasine is a perfectly good title on which to found the plea of prescription. The point is of some nicety, but was emphatically decided so long ago as 1729, when the Court held that a sasine must be recorded to afford a good title for prescription.[2] The decision was upheld by the opinion of the majority of the judges in *Kibbles* v. *Stevenson*,[3] to the effect that a sasine not recorded has not exhausted its precept, and that upon a fair construction the words of the Act 1617, c. 16, 'make no faith in judgment, etc.,' amount to a declaration of nullity.

'Falsehood.'

'Falsehood' is expressly excepted by the feudal clause of the Act 1617, c. 12, from the grounds and arguments competent for troubling land-owners in their lands which are struck at by prescription; and 'falsehood' seems to have no other meaning than forgery. 'I have always understood that the 'exception of falsehood in relation to prescription means that 'the title was forged' (p. Lord Craigie).[4] The same judge expressed a doubt as to whether the exception would not apply to cases where there was a manifest untruth *ex facie* of the title. But this was met by Lord Gillies, who pointed out how serious a thing it would be if effect must be denied to a pre-

[1] *Scott* v. *Bruce Stewart*, 1779, M. 13, 519.

[2] *Crawford* v. *M'Michen*, 1729; 2 Ross L. C. 112.

[3] 1830, 9 S. 233.

[4] *Duke of Buccleuch* v. *Cunynghame*, 1826, 5 S. 53.

scriptive title because it appeared *ex facie* of the deed that the titles had not been correctly deduced or that a wrong one had been stated.

How far titles are affected by reversions either *in gremio* of the production, or recorded in the appropriate register, may be more properly considered under the Negative Prescription.

Changes in the law.

The above, which is conceived to be a correct statement of the law as it stood at the time when Mr. Napier wrote, must be taken under qualification of the important changes which the legislature has since seen fit to introduce into our system of land-rights.

37 and 38 Vict. c. 94, § 25.

The Conveyancing Act of 1874 (37 and 38 Vict. c. 94), § 25, abolishes 'any distinction between estates in land held burgage 'and estates in land held feu in so far as regards the conveyances 'relating thereto or the completion of titles, or any of the matters 'or things to which the provisions of this Act relate.'

31 and 32 Vict. c. 101, superseding 21 and 22 Vict. c. 76.

By the Titles to Land Consolidation Act 1868 (31 and 32 Vict. c. 101), § 14, it is no longer necessary to expede and record an instrument of sasine. It is sufficient for the person in whose favour the conveyance is granted to record the conveyance itself, with a warrant of registration thereon, in the appropriate register of sasines.

The same statute, § 17, provides that in the case of conveyances which contain clauses of a private nature (such as the purposes of a trust), or where the deed contains matter unnecessary for the completion of the disponee's title or the protection of the public, a notarial instrument may be expeded in favour of the grantee setting forth the nature of the conveyance, and those parts of it which relate to the lands in which a real right is intended to be obtained, and by which real burdens, conditions, or limitations are imposed. This instrument being recorded is equivalent to a recorded sasine.

37 and 38 Vict. c. 94, § 31.

The Conveyancing Act of 1874 (37 and 38 Vict. c. 94), § 34, enacts, as we have seen (*supra* p. 7), that 'any *ex facie* valid 'irredeemable title to an estate in land, recorded in the appro-

'priate register of sasines, shall be sufficient foundation for 'prescription.' The obvious purpose of this provision is not to supersede the old statutory title demanded by the Act 1617, c. 12, but 'to add a new rule to the system according to which 'registration takes the place of infeftment.'[1] '*Ex facie* valid' means free from any *ex facie* nullity, *i.e.* from anything that will 'deprive the title of the character of a formal, complete, 'and valid instrument' (p. Lord Justice-Clerk Hope).[2] The word 'title' is to be taken in the widest sense as including all deeds by virtue of which one holds, or has held, a legal right. 'Estate in land' is defined in the Act as 'any interest in land, 'whether in fee, life-rent, or security, and whether beneficial 'or in trust, or any real burden on land,' and as including an estate of superiority. The significance of the word 'irre-'deemable' will appear later on (*infra* p. 23).

Adjudication.

Adjudication and sasine, followed in due course by decree of declarator of expiry of the legal (*i.e.* ten years from the date of the adjudication) constitutes an unassailable title to heritage. The declarator makes an end for ever of the qualifying right of redemption. For long, however, the doctrine prevailed that while a conventional penal irritancy in a reversion required declarator to make it effectual, it was otherwise with a legal irritancy, and that the expiry of the legal in an adjudication converted the creditor's right *ipso jure* into one of absolute property if the smallest fraction of the debt remained undischarged.[3] But the point was reconsidered in *Campbell* v. *Scotland*,[4] where, after an elaborate discussion, it was laid down by Lord President Campbell that the legal of an adjudication being expired does not without decree of declarator, or the express act and consent of the parties, vest the right of property in the creditor, but that, like all other penal irritancies, it must be declared. This view was followed in *Ormiston* v.

[1] Rankine, *Land Ownership*, 3d ed., p. 32.

[2] *Lord-Advocate* v. *Graham*, 1844, 7 D. 183, 196.

[3] *Livingston* v. *Goodlet*, 1704, M. 73.

1794, M. 321.

Hill,[1] and, though vehemently opposed by Lords Meadowbank and Newton, was upheld by a majority of the Court, with a view to maintaining consistency of decision, in *Stewart* v. *Lindsay*.[2] Decree of adjudication, in short, without declarator of expiry of the legal, is simply a *pignus praetorium*.[3] The principles applied by the Court to adjudications were these:—

(1) After the expiry of the legal the debtor may still purge that irritancy until the expiry has been judicially declared against him.

(2) But if he suffer forty years to elapse from the expiry of the legal without attempting to purge the irritancy, his equitable claim to be reponed is cut off by the negative prescription, and the expiry of the legal becomes effectual against him without declarator.

Prescription runs from expiry of the legal.

From the latter proposition it is no great step to what is unquestionably a settled principle of our law, that adjudication and sasine, clothed with forty years' possession from the expiry of the legal, without declarator of expiry, is a good prescriptive title. This was admitted in *Caitcheon* v. *Ramsay*;[4] it was taken for granted on both sides of the bar in *Johnston* v. *Balfour*,[5] though it was questioned in *Spence* v. *Bruce*.[6] Finally, in *Robertson* v. *Duke of Athol*,[7] Lord Chancellor Eldon discussed the point with great fulness, though it was not material to the case, and expressed the opinion (confirmatory of the view of the Court of Session)[8] that forty years' possession from expiry of the legal upon adjudication with infeftment, without any declarator of expiry of the legal, forms a good title by prescription. (Adjudication, of course, even when clothed with infeftment, if not followed by possession, remains a mere right

[1] 7 Feby. 1809, F. C.

[2] 26 Nov. 1811 (not reported), 1 Bell, Comm., 744.

[3] *Cochrane* v. *Boyle*, 1849, 11 D. 908; 1850, 7 Bell's Ap. 65.

[4] 1791, M. 10, 810.

[5] 1745, M. 10, 789.

[6] 21 Jany. 1807, 1 Ross L. C. 206.

[7] 1808, Hume 463; 1815, 3 Dow 108; 1 Ross L. C. 208.

[8] '*Nemo mutare potest causam possessionis suae* is good Roman Law, 'but very bad Scots Law' (p. Lord Hermand).

in security, and is not a right of property at all).[1] The theoretical explanation of the doctrine seems to be that the positive prescription running from the time when expiry might have been declared supplies the omission to have this done and bestows upon the adjudger's title an equivalent for declarator.[2]

Why not from date of infeftment?

But, since the mere lapse of the legal does not convert the adjudger's right into one of property, and since, nevertheless, forty years' possession from the expiry of the legal is held to be possession *animo dominii*, why should not forty years' possession from the date of infeftment upon the adjudication suffice to establish a good prescriptive title? Struck with the difficulty of finding a satisfactory answer to this question, Baron Hume opined that prescriptive possession begins to run from the date of the investiture to which it is referable, and that adjudication followed by infeftment, on which forty years' possession has immediately followed, affords an unassailable title to heritage. But however tempting and plausible this view may be, and however inconsistent the opposite opinion may appear, it is impossible to get over the authority of *Cutler* v. *M'Lellan*,[3] where the Lords were all unanimous that upon a charter of adjudication prescription of the absolute irredeemable property could not run except from the expiration of the legal. Lord Monboddo added that if prescription had been pleaded against any other than the debtor or his heir it would doubtless have run from the date of sasine; and that in a question with anybody, if the adjudger claimed no more by prescription than the redeemable right, the prescription would run from the date of sasine. With this case the later one of *M'Kenzie* v. *Robertson*[4] is in complete accordance. There adjudication and infeftment had been followed by possession for forty years from the date of sasine, but not from the expiry of the legal. In 1809, within forty years from the adjudication, the adjudger obtained decree

[1] *Anderson* v. *Nasmyth*, 1758, M. 10, 676.

[2] Napier, p. 138.

[3] 1762, 5 Br. Sup. 893; 1 Ross L. C. 204.

[4] 1827, 5 S. 648.

of declarator of expiry of the legal without calling the pursuer, who stood in the reverser's right. In 1817 the pursuer brought a reduction of that declarator, against which the defender pleaded prescription, founded on the adjudication and infeftment clothed with forty years' possession. The Court repelled the defender's plea of prescription. The case of *Gedd* v. *Baker*,[1] to which Baron Hume appeals in support of his opinion, in reality makes for neither view of the question. For there the defender was not in a position to plead forty years' possession from the expiry of the legal owing to the deduction of minorities, and all that was decided was that the lapse of forty years from the date of charter of adjudication and infeftment barred the pursuer from challenging the adjudication on the ground of extrinsic nullity. No doubt, however, was expressed but that the pursuer might have alleged 'satisfied and paid within 'the legal' at any time within forty years from the expiry of the legal.

Forty years' possession still necessary.

A decree of adjudication with infeftment thereon duly recorded, even when followed by decree of declarator of expiry of the legal, has been held not to be such an *ex facie* irredeemable title as the Statute 37 and 38 Vict. c. 94, § 34, declares shall be a good prescriptive title when clothed with only twenty years' possession. Forty years' possession is, therefore, still necessary.[2]

[1] 1760, 1 Ross L. C. 200; M. 10, 789.

[2] *Hinton* v. *Hobbs*, 1883, 10 R. 1110.

CHAPTER V

OF PRESCRIPTIVE POSSESSION

Title must be clothed with possession.

THE second requisite of a good prescriptive right is possession of a certain quality for a certain length of time. On the one hand charter and sasine without possession enjoy no peculiar privilege under the Act 1617, c. 12, in a competition of titles. A superior conveyed his superiority to another, but still retained it in his own titles. It was held that he reacquired it by the vassal in the lands obtaining entry from him instead of from the disponee of the superiority. His title, that is to say, *plus* possession through the vassal, prevailed against the infeftment of the disponee on which no possession had followed.[1] So where the Magistrates of a Royal Burgh had granted repeated renewals *more burgi* of investitures specially containing a piece of ground in dispute, their continued possession of the subject following on charter of confirmation and new erection was held to establish in them a good prescriptive right as against the competing party to whom and to whose authors these renewals had been granted.[2] 'Can a superior,' asked Lord Cringletie, 'prescribe against a vassal a subject previously 'granted to him? I have no doubt he can. If the vassal does 'not possess, it is an abandonment of the feu. Prescription is 'not interrupted by renewals of the grant.'

Possession must be referable to title.

On the other hand, no peculiar privilege is conferred by the Act upon possession, no matter for what length of time, without charter and sasine. 'Possession is of no sort of importance 'in a question of prescriptive right to a feudal subject unless 'there have been a legal title on which prescription was to

[1] *Fergusson* v. *Gracie*, 1832, 3 Ross L. C. 370.

[2] *Aytoun* v. *Magistrates of Kirkcaldy*, 1833, 11 S. 676.

'begin its course' (p. Lord Cringletie).[1] Prescriptive possession of salmon fishings in the sea will not confer a right of salmon fishings on the proprietor of a barony bounded by the sea, unless that possession can be ascribed to the barony title.[2] Possession alleged upon a minute of council (on which no title had been made up) was held to be an irrelevant plea, inasmuch as the minute was contradictory of the right claimed.[3] The Duke of Buccleuch raised an action against the Magistrates of Edinburgh for reduction of a decree of the Judge Admiral relative to the boundaries of conterminous oyster fishings in the Firth of Forth, combined with declarator of the extent of his right. The defenders admitted that they could not resist reduction of the decree, but in regard to the declarator pleaded their possession as limiting the pursuer's right. The plea of possession was held irrelevant, since possession could only be referred to the decree, which was admittedly open to reduction.[4]

'Part and pertinent.'

Although possession must be referable distinctly to an infeftment and to the infeftment produced, a right or subject may nevertheless be carried by prescription (even if it be not expressed in the prescriber's charter), which has been possessed for the statutory period as *part and pertinent* of another subject specially mentioned in it. Where, however, a proprietor founds on a conveyance of heritage with parts and pertinents as a prescriptive title to lands not mentioned in the conveyance, it is not enough for him to show that he has possessed them *along with* the principal lands for forty years. The *onus* lies on him of proving that he has had possession of them as *part and pertinent* of the principal lands.[5] So powerful is the effect of possession upon a clause of part and pertinent that it prevails in a competition against an express grant of the subject in

[1] *Officers of State* v. *Earl of Haddington*, 1830, 8 S. 867, 874. See, too, *Edmonstone* v. *Jeffray, etc.*, 1886, 13 R. 1038.

[2] *Milne's Trustees* v. *Lord-Advocate*, 1873, 11 M. 966.

[3] *Ross* v. *Milne, Cruden & Co.*, 1843, 5 D. 648.

[4] *Duke of Buccleuch* v. *Magistrates of Edinburgh*, 1843, 5 D. 846.

[5] *Lord-Advocate* v. *Hunt*, 1867, 5 M. H. L. 1; *Scott* v. *Napier*, 1869, 7 M. H. L. 35.

question upon which infeftment has followed, but not possession. Thus the titles to the barony of Elcho, with parts and pertinents, clothed with possession for forty years, were held sufficient to constitute a good right of property in an island in a river opposite the barony, though the island was included *per expressum* as a separate tenement in the titles of a third party, and though a decree of declarator of property in the island had passed in 1637 in favour of that third party, who had never enjoyed possession of the subject.[1] So, too, an infeftment in lands with parts and pertinents was found a sufficient title on which to acquire by possession *quâ dominus* a right of property in an adjoining moor not expressly included in that infeftment, and expressly included in the titles of another, and that notwithstanding an old decree finding the prescriber's right in the moor to be one of servitude only.[2] In like manner, possession for forty years as part and pertinent constitutes a good prescriptive title to property, even where the pursuer produces a tack prior to the forty years, and alleges that possession originally began upon it.[3] On the other hand, an express grant renewed in all succeeding investitures cannot be lost by failure to possess unless the competing party can produce a proper title to which his possession may be ascribed. Where the charter of a burgh of barony contained no right of fishing in a certain loch, but merely a right of harbour, although in the *tenendas* 'cum aucupationibus, piscationibus' was thrown in, forty years' possession of oyster fishings in the loch by the Magistrates was held not to constitute a good prescriptive right to the oyster fishings in a competition with one holding an exclusive right to them by charter and sasine, though not clad with possession.[4] In such cases, however, the bare title with sasine that prevails must be express and unmistakeable; and

[1] *Magistrates of Perth* v. *Earl of Wemyss*, 1829, 8 S. 82.

[2] *Earl of Fife's Trustees* v. *Cuming*, 1830, 8 S. 326.

[3] *Countess of Moray* v. *Earl of Wemyss*, 1675, M. 9636. *Grant* v. *Grant*, 1677, M. 10, 876.

[4] *Agnew* v. *Magistrates of Stranraer*, 1822, 2 S. 36.

where a proprietor claimed as property the *alveus* of a stream which he admitted had been possessed and administered by the Magistrates of the town for more than forty years, he was required to produce a title from the Magistrates divesting them, and it was held that his mediate titles, implicitly including the *alveus*, not being clad with possession were of no avail.[1]

Possession as determining a right.

But where both competing parties produce titles equally habile for prescription, the state of possession will determine whose is the right. Two baronies, A and B, the titles to which contained clauses of parts and pertinents, were erected into one barony, C. The proprietor sold a portion of A with parts and pertinents, and this portion was excepted, and the clause of parts and pertinents applicable thereto was omitted, from his subsequent titles. A competition arose between the heir of the seller and the heir of the purchaser as to a tract of ground belonging to A, not expressly mentioned in either of their titles, but claimed by both as part and pertinent, by the heir of the purchaser as his exclusive property, by the heir of the seller in common property with the heir of the purchaser. It was held that the heir of the seller had a good title on which to prove prescriptive possession of commonty or of a servitude; and that as both parties claimed under clauses of part and pertinent, the extent of their rights fell to be determined by proof of the state of possession.[2] A, by contract ratified by Act of Parliament, acquired right to certain feu-duties which had pertained to an hereditary keepership. Infeftment followed, and feu-duties were paid down to within forty years of the action. Then B, a proprietor of lands, refused to pay feu-duties, on the ground that he had possessed for more than the prescriptive period upon a Royal Charter converting his holding into blench, and that under this investiture the subsequent

[1] *Jamieson* v. *Police Commissoners of Dundee*, 1884, 12 R. 300. See *Wilson* v. *Martin*, 1843, 6 D. 7.

Carnegie v. *MacTier*, 1844, 6 D. 1381.

titles had been made up. It was held that A had a right to the feu-duties in virtue of the constant possession that had followed on his titles, notwithstanding the lands having been held blench in the proprietor's titles for more than the years of prescription.[1]

Possession as interpreting Crown grants.

Possession then for the prescriptive period may be said to explain and illustrate the import of a grant. Thus a grant from the Crown of lands *cum piscationibus* with forty years' uninterrupted possession of the salmon fishings establishes an invulnerable right to these salmon fishings.[2] A proprietor infeft upon Crown charter *cum piscationibus* was held to have established a right to salmon fishings in the Tweed *ex adverso* of lands belonging to other proprietors.[3] A grant of lands with parts and pertinents is sufficient title on which to acquire by possession a prescriptive right to eel-cruives in a river to which the lands are adjacent.[4] A Crown grant of lands on the banks of a loch, 'with the salmon fishings in the wester end' of the loch 'effeiring thereto,' may be set up as a title to salmon fishings *ex adverso* of lands belonging to other proprietors by proof of the exercise of salmon fishing for the prescriptive period.[5] Infeftment in a sheriffship, with all the casualties belonging to the office, *plus* possession for forty years, sufficiently instructs a right to salmon fishing.[6]

Barony titles.

Similarly, infeftment in a barony, followed by possession of the salmon fishings for the prescriptive period, will be a good title to the salmon fishings even against the Crown.[7] A question arose between the Crown and the owner of a barony as to salmon fishings in a particular part of a river. It was held not

[1] *Duke of Montrose* v. *Bontine*, 1840, 2 D. 1186.

[2] *Earl of Southesk* v. *Earlshall*, 1667, M. 10, 842; *Fullerton* v. *Earl of Eglinton*, 1672, M. 10, 843; *Stuart* v. *M'Barnet*, 1867, 5 M. 753; 1868, 6 M. H. L. 123.

[3] *Ramsay* v. *Duke of Roxburghe*, 1848, 10 D. 661.

[4] *Braid* v. *Douglas*, 1800, M. Property App. 1. 2.

[5] *Fraser* v. *Grant*, 1866, 4 M. 596.

[6] *Earl of Moray* v. *Feuars of Ness Water*, 1677, M. 10, 903.

[7] *M'Douall* v. *Lord-Advocate*, 1875, 2 R. H. L. 49, reversing Court of Session, 11 M. 688. *Lord-Advocate* v. *M'Culloch*, 1874, 2 R. 27.

necessary to inquire whether the owner of the barony had by express grants acquired rights to the whole salmon fishings in the river *ex adverso* of his lands; because the full possession he had had in one part of the river, in conjunction with his title, sufficed by prescription to confer a right to the salmon fishings in the whole river as *unum quid, ex adverso* of the lands included in the barony.[1] A Crown title to a barony with fishings was found to be sufficient title on which to establish by evidence of exclusive possession for the prescriptive period an exclusive right to mussel scalps betwen high- and low-water mark.[2] Barony titles which contained no express grant of foreshore, nor any description of the land by boundaries, were held, when clothed with possession, to be sufficient foundation for a prescriptive right of property in the foreshore.[3] A charter of barony with a clause of parts and pertinents is a sufficient title, when clothed with the requisite possession, to constitute a prescriptive right to ferry over a navigable river.[4]

Base rights to *regalia*.

But it is not only upon Crown charters or upon barony titles that possession for the prescriptive period operates in this manner. A base right to salmon fishings, or even 'fishings,' will probably be converted by possession into a good prescriptive title to salmon fishings.[5] A disposition of lands and shore-ground, though not confirmed by the Crown, clad with possession for the prescriptive period, was held sufficient to instruct a prescriptive title to the foreshore of a navigable tidal river.[6] And, in general, a Crown charter by progress, or even a charter from a subject, is a good title upon which forty years' possession may erect a prescriptive right to *regalia*.[7]

[1] *Lord-Arocate* v. *Lord Lovat*, 1880, 7 R. H. L. 122. But see *Lord Advocate* v. *Cathcart*, 1871, 9 M. 744.

[2] *Duchess of Sutherland* v. *Watson*, 1868, 6 M. 199.

[3] *Lord-Advocate* v. *Lord Blantyre*, 1879, 6 R. H. L. 72.

[4] *Duke of Montrose* v. *Macintyre*, 1848, 10 D. 896.

[5] *Lord-Advocate* v. *Sinclair*, 1865, 3 M. 981; 1867, 5 M. H. L. 97. *Earl of Zetland* v. *Glovers of Perth*, 1868, 6 M. 292.

[6] *Buchanan & Geils* v. *Lord-Advocate*, 1882, 9 R. 1218; cf. *Young* v. *N. B. Ry. Coy.*, 1885, 13 R. 314; 1887, 14 R. H. L. 53.

[7] *Lord-Advocate* v. *Hebden*, 1868, 6 M. 489.

As a further illustration of the operation of possession in explaining a grant, we may note *M'Arly* v. *French's Trustees.*[1] A cornice and sign-board projected beyond the centre of the joists between the ground floor and the first floor of a tenement, and had been in their then position for forty years. They were found to have been possessed during that period as part and pertinent of the shop on the ground floor, and it was held that the proprietor of the upper flat was not entitled to have them removed. Again, in the case of a garden in a square in a town, it was held that the past possession and administration thereof must be the measure of the feuars' rights therein, which were not expressly defined in the titles.[2]

Charters to burghs.

A similar principle governs an important class of cases, where the question at issue has been the extent of the right enjoyed by the magistrates or the inhabitants of a royal burgh or a burgh of barony. Thus, the charter of a Royal burgh is a habile title on which to prescribe a right to exact harbour and shore dues, and the usage of exaction for more than the prescriptive period will fix the limits of the right.[3] A charter to a royal burgh with grant of havening places and petty customs, but with no express grant of ferry, was held sufficient, when clothed with prescriptive possession, to sustain a right to ferries.[4] The charters of the royal burgh of Edinburgh were held to vest in the magistrates a sufficient title on which to acquire by immemorial possession the right to levy certain petty customs.[5] A Royal charter clothed with forty years' exercise of the right constitutes a good title in the magistrates of a burgh to levy tolls.[6] But a right to levy bridge custom under ancient charters was held to be qualified by usage and restricted by prescription.[7]

[1] 1883, 10 R. 574.

[2] *Governors of George Watson's Hospital* v. *Cormack*, 1883, 11 R. 320.

[3] *MacPherson* v. *Mackenzie*, 1881, 8 R. 706.

[4] *Greig* v. *Magistrates of Kirkcaldy*, 1851, 13 D. 975.

[5] *Hill* v. *Magistrates of Edinburgh*, 1830, 8 S. 449.

[6] *Magistrates of Campbeltown* v. *Galbreath*, 1845, 7 D. 482.

[7] *Maxwell* v. *Provost of Dumfries*, 1866, 4 M. 764.

Explained by use.

The use to which the lands of a Royal burgh, or a burgh of barony, have been put by the inhabitants for the prescriptive period constitutes such a qualification of the right of property in these lands as will effectually prohibit any change in the enjoyment of them that may threaten to impair that use. In the *Kilmarnock* case the magistrates were held not to be entitled to feu ground which had always been used by the manufacturers and the inhabitants of the burgh for bleaching, drying, and other purposes.[1] In the *Burntisland* case, the judgment of the Court finds, 'that the uses to which the property in 'question since the acknowledged grants thereof, has been 'applied sufficiently instruct that it is so far *juris publici* that 'the magistrates as managers of the property of the burgh 'are not entitled to dispose of the subjects in question 'so as to defeat and impair the right and interest of the 'public in the enjoyment of the said public use.'[2] This rule, that when any part of the burghal estate has been applied for the common purposes of the inhabitants from time immemorial, these purposes form a condition of and burden on the magistrates' right which they connot reject, was followed in the *Eyemouth* case,[3] where a charter of erection into a burgh of barony, followed by immemorial possession, was held to be a sufficient title on which the inhabitants might prescribe a right to the use of a bleaching-ground and a well within the territory of the burgh. The whole question was very fully discussed in the case of *Sanderson* v. *Lees*,[4] where a burgess of the Royal Burgh of Musselburgh sought with success to interdict the magistrates from feuing a portion of the links, over which he maintained that the inhabitants had prescribed a right of playing golf by possession and use from time

[1] 1776, 5 Br. Sup. 496. See *Young* v. *Dobson*, 2 Feby. 1816, F.C.; *Wallace* v. *Magistrates of St. Andrews*, 1824, 2 S. 629; *Magistrates of Auchtermuchty* v. *Officers of State*, 1827; 5 S. 690.

[2] 1812, noted in 9 D. 293.

[3] *Home* v. *Young*, 1846, 9 D. 286.

[4] 1859, 21 D. 1011; 22 D. 24. See, too, *Paterson* v. *Magistrates of St. Andrews*, 1879, 7 R. 712; 1881, 8 R. H. L. 117; *Grahame* v. *Magistrates of Kirkcaldy*, 1879, 6 R. 1066; 1881, 8 R. 395; 1882, 9 R. H. L. 91.

immemorial. From the opinions delivered from the bench, we extract the following passages, premising that it was agreed by the magistrates to admit that from time immemorial the links and the piece of ground in question had been possessed and used by the inhabitants for the purpose specified:—'It appears to me that with that fact established 'the right of the complainer and the other inhabitants is not 'to be regarded as a servitude right at all. . . . I think that 'the possession contended for, and established, was all along a 'quality of the right which the magistrates had in this property, 'and that the inhabitants are entitled to protect it from encroach-'ment' (p. Lord President M'Neill.) 'The magistrates have 'right to administer this portion of the common good not for 'purposes exclusive of the members of the community, but 'because it was vested in them subject to the community—'that is to say, *the title is explained by the possession as a title 'of property to certain effects in the members of the community.* '. . . The grant in the magistrates is one which use shows to 'be a grant supporting the possession of the inhabitants' (p. Lord Ivory). 'Inveterate usage has the effect of an exponent 'of the meaning and purport of ancient writings upon which 'such usage has followed. It has been held that though the 'property is vested in the corporation, or even in the superior 'of the burgh, yet one of the purposes for which it is so vested 'in them is to hold it for the use of the inhabitants and others, 'to the effect of their enjoying the privileges which they have 'so exercised; that this would be an unquestionably good 'title in law if that purpose had been distinctly expressed in 'the charters of incorporation of the burgh; and that though 'it be not particularly set forth in these charters, yet the im-'memorial usage following upon them is sufficient to show that 'such was their meaning and effect. . . . The legitimate effect of 'usage following upon the grants to the corporation is to explain 'their import, and the nature and extent of the grants thereby 'made to the burgesses and the inhabitants' (p. Lord Curriehill).

The right claimed must be consistent with title.

While, however, possession may legitimately serve to interpret the written title, a claim to any right based upon a title clad with possession will not be maintained if the right claimed be inconsistent with or contrary to the title produced, to which possession is referred. Thus a disposition of a superiority, bearing on the face of it to be a conveyance of the superiority and nothing more, will probably not be so fortified by possession of the minerals for forty years as to constitute an unassailable title to the minerals.[1] The Earl of Haddington sought declarator of his right to work quarries in the park of Holyrood House, in virtue of forty years' possession of the right as part and pertinent of his feudal grant as ranger and keeper of the park. The House of Lords held, upon the facts, that the exercise of the right alleged was not sufficiently proved; and, on the law, that the privilege claimed, instead of being a pertinent of the office, was actually opposed to the duty it involved of preserving the park from delapidation. The question of the *validity* of a grant may be determined by prescription. If the grant were questioned, prescription would establish and confirm it. But prescription cannot raise up a a title against the granter to the effect of altering the nature of the grant. What the grant carries must be determined by its own terms, and though these may be explained by usage, the import of the grant can never be turned by prescription into something contradictory of its express terms.[2] A vassal cannot exclude his superior from the *dominium directum* by possession upon the charter proceeding from the superior, for that title carries on the face of it the negation of any such right. On the same principle, no misapplication of a fund or non-fulfilment of a trust can be fortified by long usage or prescription so as to afford a defence to an action for enforcing the due execution of the trust;[3] and usage adverse to the terms of a

[1] *Fleeming* v. *Howden*, 1868, 6 M. 782.

[2] *Officers of State* v. *Earl of Haddington*, 1830, 8 S. 867; 5 W. & S., 570; *Ross* v. *Milne, Cruden & Co.*, 1843, 5 D. 648.

[3] See *Thain* v. *Thain*, 1891, 18 R. 1196, (p. Lord Kinnear), at p. 1201.

grant cannot be founded on as *contemporanea expositio*.[1] So the magistrates of a burgh have no right to impose customs or restrictions which their general title will not support.[2] *A fortiori*, possession cannot be attributed to an absolute title when it has really taken place upon some other. In this sense *nemo mutare potest causam possessionis suae*.[3] If the title be limited, as in the case of a bounding charter, possession will not remove the limitations. One who held lands upon a bounding title was found to have acquired no right to a piece of ground outside his boundary by the unchallenged possession for more than forty years of a building upon it.[4] Where in a feu-contract there were measurements and specifications of certain boundaries, it was held that since these, taken together, 'bring out precisely the whole of the boundaries so as to leave 'the space enclosed a matter of certainty,' there was a bounding title which prevented the acquiring by prescription of any property outside the boundary.[5] The proprietor of a barony to which a commonty belonged feued out the whole barony at different times to different persons, giving to some feuars a right of common property in the commonty, to others a right of servitude only, and to others again no right in the commonty at all. In an action for division of the commonty, the feuars who had a right of property in the commonty were found to have a *justus titulus* which fortified by possession might have deprived some one of the property. But such *justus titulus*, it was held, could not in the case of each feuar be broader than the share effeiring to his portion of the valued rental of the barony; so that the body of the feuars could not make out an exclusive right of property to the whole commonty. The limitation acted like a bounding charter.[6] The proprietor of a

Bounding charter.

[1] *Presbytery of Dundee* v. *Magistrates of Dundee*, 1858, 20 D. 849; *University of Aberdeen* v. *Magistrates of Aberdeen*, 1876, 3 R. 1087.

[2] *Earl of Moray* v. *Magistrates of Kinghorn*, 1762, M. 1988.

[3] *Carnegie* v. *Magistrates of Montrose*, M. *voce* Possession App. 1.

[4] *Magistrates of St. Monance* v. *Mackie*, 1845, 7 D. 582. See, too, *Reid* v. *M'Coll*, 1879, 7 R. 84.

[5] *Stewart* v. *Greenock Harbour Trustees*, 1866, 4 M. 283.

[6] *Duke of Buccleuch* v. *Erskine*, 16 June 1812, F. C.

barony under titles which contained a clause of parts and pertinents, but which described the lands as all lying within a particular parish, was held to be unable to acquire by prescriptive possession any right of common property in lands lying beyond the limits of the parish.[1] On the other hand, where a proprietor had a grant of lands described as lying within a county bounded by a river which separated that county from another, with the salmon-fishings pertaining to the said lands, it was held that the description applied to the lands and not to an incorporeal right attached to them, and that a title to salmon-fishings not confined to that part of the river *ex adverso* of the lands, and also to fishings beyond the *medium filum* might be instructed by corresponding possession of the salmon-fishings for the prescriptive period.[2]

Possession must be full, unequivocal, and specific;

Possession must not only be referable to some habile title. It must also be fully, unequivocally, and specifically applied, without any doubt to the subject claimed. In a competition for the minerals of an estate, the party in possession of the lands pleaded his infeftment in the lands, with parts and pertinents, followed by possession of the minerals, as against an express grant of the minerals. As from the very nature of the plea of prescription the Court could not go beyond the titles of the proprietor of the estate to discover their import, and as his infeftment, if followed by possession for a sufficient period, would constitute under the statute an unassailable title, the question to be determined was whether the requisite possession had taken place. It was held that there must be possession of the minerals themselves and not merely of the surface, that while possession for every day of the forty years, or even for every year, cannot be required, there must be such possession by working the coal as must, or in reason ought to, have kept up in both parties, during the whole of the prescriptive period, the impression that the coal was in possession of the party pleading prescription, and that proof of the

[1] *Gordon* v. *Grant*, 1850, 13 D. 1.
[2] *Earl of Zetland* v. *Tennent's Trustees*, 1873, 11 M. 469.

possession of the coal was required in each separate parcel of the lands.[1] But where there is an express title to minerals, possession of the surface alone is sufficient to complete a prescriptive right to the minerals; working the minerals being held *res merae facultatis*.[2] The fact, however, of this full, unequivocal, and specific possession must be judged of *secundum subjectam materiam*. Thus, while, as a general rule, possession of salmon-fishings to constitute a prescriptive title thereto must be by net and coble,[3] and while, for example, fishing with a rod for salmon for the prescriptive period will not make a grant of lands *cum piscationibus* a good title to the salmon-fishings,[4] an exception will be made in cases where, from the nature of the river, fishing by net and coble is impracticable.[5] Proof of prescriptive possession by means of a cairn-net was held to have established a right to salmon-fishings *ex adverso* of another proprietor's lands in one who was infeft upon a crown charter *cum piscationibus*.[6] But a right cannot be constituted, or a title interpreted contrary to the established law, by possession for the prescriptive period in violation of the law;[7] though an illegal mode of possession may be strong evidence of the existence of a legal right.[8]

continuous, peaceable, and exclusive.

Possession, moreover, must be continuous, peaceable, uninterrupted, and exclusive.[9] The fact of possession may be continuous, though the several acts of possession are at considerable intervals. How many acts will infer the fact is a question of proof and presumption independent of prescrip-

[1] *Forbes* v. *Livingstone*, 1827, 6 S. 167.

[2] *Crawfurd* v. *Bethune*, 1821, 1 S. 110.

[3] *Duke of Sutherland* v. *Ross*, 1836, 14 S. 960; *Duke of Richmond* v. *Earl of Seafield*, 1870, 8 M. 530; *Sinclair* v. *Threipland*, 1890, 17 R. 507. But see Lord Watson's opinion in *Warrand's Trustees* v. *Mackintosh*, 1890, 17 R. H. L. 13.

[4] *Milne* v. *Smith*, 1850, 13 D. 112.

[5] *Stuart* v. *M'Barnet*, 1867, 5 M. 753; 1868, 6 M. H. L. 123; *Earl of Dalhousie* v. *M'Inroy*, 1865, 3 M. 1168.

[6] *Ramsay* v. *Duke of Roxburghe*, 1848, 10 D. 661.

[7] *Mackenzie* v. *Renton*, 1840, 2 D. 1078.

[8] *Lord-Advocate* v. *Lord Lovat*, 1880, 7 R. H. L. 122, 166.

[9] *Earl of Fife's Trustees* v. *Sinclair*, 1849, 12 D. 223.

tion.[1] 'Though possession be not proved to have continued 'every quarter, month, or year, yet ordinary possession will be 'sufficient *ad victoriam causae* (albeit it be proponed in the 'terms of a continual possession) *quia probatis extremis prae-'sumuntur media;* if the distance be not great.'[2] Exclusive possession is essential,[3] and where the question goes to a jury, the word 'exclusive' must qualify possession in the issue.[4] The degree of exclusiveness, so to speak, required, will differ somewhat according to the nature of the subject claimed to have been possessed for the prescriptive period. In *Lindsay* v. *Robertson*,[5] where the pursuers claimed a right to mussel-fishings on a barony title *plus* possession, Lord Barcaple thus directed in the jury. (1) The prescriptive possession of the pursuers must be continuous, open, and exclusive; (2) the exclusive nature of the possession, if proved otherwise, would not be disproved by the fact that others had fished mussels there furtively, or so as to show that they believed they were committing a trespass, but (3) members of the public commit no wrong in taking mussels the title to which is in the Crown, so long as the Crown does not interfere, and counter-possession of the public during the prescriptive period will exclude the claim of the pursuers founded on exclusive possession and their barony title. In complete agreement with this direction are the observations of Lord Watson in *Young* v. *N. B. Ry. Coy.*,[6] where the right to a foreshore was at stake. 'In cases 'where the sea-shore admits of an appreciable and reasonable 'amount of beneficial possession, consistently with the rights 'of navigation and of the general public, the riparian proprietor 'must be held to have had possession within the meaning of 'the Act 1617, c. 12, if he has had all the beneficial uses of 'the foreshore which would naturally have been enjoyed by

[1] See *Macdonnell* v. *Duke of Gordon*, 1828, 6 S. 600.

[2] Stair, 4. 40. 20.

[3] *Duke of Portland* v. *Gray*, 1832, 11 S. 14.

[4] *Lindsay* v. *Robertson*, 1867, 6 M. 889.

[5] 1868, 7 M. 239.

[6] 1887, 14 R. H. L. 53.

'the direct grantee of the Crown. In estimating the character 'and extent of his possession, it must always be kept in view 'that possession of the foreshore in its natural state can never 'be, in the strict sense of the term, exclusive. The proprietor 'cannot exclude the public from it at any time, and it is 'practically impossible to prevent occasional encroachments 'on his right.' With regard to concurrent acts of possession by members of the public who have no grant or license from the Crown, Lord Watson went on to say: 'These were in no 'proper sense the acts of the Crown, but acts of that descrip- 'tion, though done without title, tend to derogate from the 'possession of the riparian proprietor, and, if carried far 'enough, will deprive his possession of that exclusive character 'which is necessary in order to establish a prescriptive right.'

Formerly forty years.

Possession must be for the whole of the statutory period. In all actions begun prior to 1 January 1879, that period was 'the space of forty years continuously and together.' When possession for forty years back has been proved, it is presumed to have continued from time immemorial, so as to connect it with an earlier habile title, which it may serve to interpret.[1] Lord Benholme once endeavoured to draw a distinction between possession extending the scope of a grant, which required to continue for forty years, and possession merely explaining a grant for which he held a shorter period would suffice. But the distinction was expressly rejected by Lord Justice-Clerk Inglis,[2] who insisted that nothing short of forty years would be enough. The interruption of possession on the last day of the forty years will wipe out all the possession that has gone before. 'It is the uninterrupted completion of the full pre- 'scriptive period that alone makes prescription, and after dis- 'possession, if prescription is to run again, it must be com- 'menced upon a new course of time.'[3] (See *infra* p. 107).

[1] *Lord-Advocate* v. *Sinclair*, 1865, 3 M. 981; 1867, 5 M. H. L. 97; *Lord-Advocate* v. *M'Culloch*, 1874, 2. R. 27.

[2] *Fraser* v. *Grant*, 1866, 4 M. 596.

[3] Napier, p. 704.

By the Statute 37 and 38 Vic. c. 94, § 34, it is enacted that possession following on such a title as is declared by the Act to be sufficient foundation for prescription, 'for the space of 'twenty years continually and together, and that peaceably 'without any lawful interruption made during the said space 'of twenty years shall for all the purposes of the Act 1617, c. '12., . . . be equivalent to possession for forty years by virtue 'of the titles' specified in that Act. This enactment may only be pleaded in actions begun on or after 1 January 1879, and possession for any time prior to that date is to have no effect for the purposes of this section 'unless such space of time 'immediately preceded and was continuous up to the said' date. The Court has construed the language of this statute in the widest sense, and has held that twenty years' possession has been substituted for forty for all the purposes of that Act as interpreted in the decisions of the Court, *e.g.* the case of prescribing a right as a part and pertinent.[1] But forty years' possession from the expiry of the legal is still necessary to convert an adjudication into a good prescriptive title, an adjudication not being an '*ex facie* valid irredeemable title' in terms of 37 and 38 Vic. c. 94, § 34.[2] A curious conflict, it may be noted, might readily enough arise between this section of the Conveyancing Act and the second, or general, portion of the Act 1617, c. 12. A party may still successfully quarrel and reduce a deed, on the ground of extrinsic nullity, at any time within forty years of its date. Yet one who had possessed for twenty years upon such a deed, would be able, supposing it to be *ex facie* valid, to found upon it a good prescriptive title to the lands which it purported to convey. His deed, of which the nullity had *ex hypothesi* been demonstrated and judicially declared, on extrinsic grounds, would if clothed with possession for the statutory period prevail over any the most correct progress of titles.

Now twenty years.

[1] *Buchanan & Geils* v. *Lord-Advocate*, 1882, 9 R. 1218.

[2] *Hinton* v. *Hobbs*, 1883, 10 R. 1110.

Possession natural or civil.

Possession may be either natural, *i.e.* in the person of the proprietor, or civil, *i.e.* in the person of another for behoof of the proprietor. Where one possesses in his own right, his possession can profit none but himself. Mr. Bell lays down that the possession of a disponee will profit his author;[1] but it is submitted with great deference that this proposition is erroneous, and that, on the contrary, a disponee can by his own possession acquire a right against his author.[2]

Wadsetter and reverser.

On the other hand, wherever one possesses in the right of another, his possession will profit that other person.[3] Upon this principle, the possession of a reverser who possessed the lands for half the prescriptive period upon a back-tack from the wadsetter was held to be that of the wadsetter, and capable of being conjoined to his; and he having possessed for the other half of the prescriptive period in person was found thus to have acquired a good prescriptive right.[4] Similarly, where the proprietor of lands sold in an adjudication had redeemed them either before declarator of expiry of the legal, or before the running of prescription, in a question with a third party who challenged his right to the lands, he was held entitled in pleading prescription to found upon the adjudger's possession as having been prescriptive for him.[5]

Landlord and tenant.

The simplest illustration of the doctrine is found in the case of a tenant whose possession in this respect profits not himself but his landlord. So long as a tenant continues to possess upon his tack, his possession is the landlord's possession, and he can prescribe no right of property in virtue of that possession against the landlord from whom his right flows. But if the tenant procure a grant of the lands *a non domino*, pay no rent, and continue in full possession for the prescriptive period, he will then be in a position to propone a good statutory

[1] *Prin.*, § 2005.

[2] *Clerk* v. *Earl of Home*, 1746, M. 10, 662.

[3] Kilkerran, *voce* Adjudication, p. 11.

[4] *Murray* v. *Maclellan*, 1713, M. 10, 934.

[5] *Burgy* v. *Strachan*, 1667, M. 1305.

prescriptive right to the lands which will prevail alike against the original landlord and against third parties. Though the tenant may not change his title in course of possession, and ascribe to the new title the possession that was really referable to the old one, he is free if he can to complete the full period of possession upon the new title of property.[1] Hence Lord Hermand's sweeping dictum, already quoted, that *nemo mutare potest causam possessionis suae*, 'is good Roman law, but very bad 'Scots law.'[2] The equivalent of that maxim in Scots law is the proposition that no one can prescribe a right contrary to the terms of the title to which he ascribes the possession of that right. If there be a change of title, there must be a shifting of the ascription of possession.

Superior and vassal.

In like manner the possession of the vassal is the possession of the superior in questions between the superior and third parties. The proprietor of a barony, upon a Crown charter with fishings, granted a feu charter of the lands with fishings in the *tenendas*. Immemorial possession was proved. It was held that the Crown charter of barony, followed by possession, was sufficient to divest the Crown of the right to salmon-fishings, and that it was immaterial whether the proprietor had possessed in person, or through his vassal.[3] On the other hand, the proprietor of a barony, with no express grant of salmon-fishings, was held not to have instructed a prescriptive right thereto, by proving that the tenants of cottages on his estate had been in use to fish for salmon in the sea for their own behoof, without paying rent.[4] As between superior and vassal, the principle that we have so often had occasion to insist upon again confronts us, namely, that the vassal cannot by possession prescribe a right contradictory of that contained in the title to which his possession is to be ascribed. Failure to exact feu-duties or the

[1] *Grant* v. *Grant*, 1677, M. 10, 876.

[2] *Robertson* v. *Duke of Athole*, 1 Ross, L. C. 208.

[3] *Lord-Advocate* v. *M'Culloch*, 1874, 2 R. 27.

[4] *Lord-Advocate* v. *Hall*, 1873, 11 M. 967.

like will not imply a dereliction of his right by the superior, or an interruption of his possession, for the vassal's possession is his. It has long been settled law that 'the possession of a 'superiority is not by uplifting feu-duties or casualties; but if 'the vassal has possessed upon a right derived from the superior 'or any of his authors, then his possession is in the construction 'of the law accounted the possession of the superior.'[1] With this doctrine it seems quite impossible to reconcile the case of *M'Kerrel* v. *Lord Keith*,[2] where a series of investitures bearing a *reddendo* of £12 Scots was found insufficient to alter an old blench tenure in respect of want of possession of the £12 Scots. While, however, failure to pay feu-duties for forty years will not avail to destroy the feudal relationship, or to impair the superior's right, still, if the vassal obtain a charter from some one other than the true superior, and possess upon that for forty years, at the same time paying no feu-duty to the true superior, the vassal will have acquired a good prescriptive right against the true superior, and their feudal relationship will be extinguished.[3] So a right to burgage tenure was found to have been gained by forty years' possession upon burgage titles, not the less easily, that the party claiming the superiority could produce no feu-charter or disposition.[4] It is in this sense that, in the phrase of Lord Armadale, 'a change of tenure may be 'gained by prescription.'

Liferenter and fiar.

In the same way, the possession of the liferenter is that of the fiar. In 1678, the Earl of Argyle disponed the estate of Otter to Colin Campbell, expressly reserving a life-rent of part of the lands, which had been constituted, not by the Earl nor by his author, but by a party from whose heir the estate had been adjudged by the Earl's author, and whose representative claimed the lands as *verus dominus* against the Earl or those in his right. Colin Campbell obtained a Crown charter of the whole

[1] *Campbell*, 5 Br. Supp., 812.

[2] 1801, Hume, 458.

[3] *Macdonald* v. *Lockhart*, 1853, 1 MacQu. 790; 25 S. J. 559; Paterson, 274.

[4] *Hamilton* v. *Scotland*, 1807, Hume, 461.

estate of Otter in the same year 1678, and was infeft thereon. The charter made no reservation of the life-rent in the dispositive clause, nor was it mentioned in the precept or the instrument of sasine. About the same time Colin Campbell, by means of an excambion with the life-rentrix, obtained possession of the liferent lands. He possessed the lands down to 1759, when an action was raised against him at the instance of a representative of the *verus dominus*, from whom the estate had been originally adjudged. The question arose, Was Colin Campbell's possession of the liferent lands to be attributed to the charter and sasine of 1678, or to the assignation by the life-rentrix of the liferent flowing from the *verus dominus*? The Court of Session held that the defender had not produced enough to exclude the pursuer's title to the liferent lands; that, in fact, possession by a liferenter, or by one possessing in right of a liferenter, cannot be counted against the party from whom the liferent flowed. But the House of Lords, while not opposing this view, gave judgment for the defender, on the broad ground that by his charter and sasine, clothed with possession, he had instructed a good prescriptive right to the lands, and that it would be 'highly 'inexpedient and endless for courts to make enquiries about the 'origin of possession after it was continued for forty years, and 'complete heritable titles in the possessor's person.'[1] The rule that possession by the liferenter cannot operate to the prejudice of the granter of the liferent, or of his representatives, was affirmed in *Nielson* v. *Erskine*,[2] and is implicit in the early case of *Younger* v. *Johnstone*.[3] There the assignee of an heir challenged the right of a competing heir, who pleaded prescription upon forty years' possession of the lands by a life-rentrix, whose grant flowed from one of whom the rival heirs each claimed to be the representative. The heir pleading prescription could only benefit by the possession of the life-rentrix (the grant not having

[1] *Campbell* v. *Wilson*, 1770, 5 Br. Supp. 543. See also *French* v. *Pinkstan*, 1835, 13 S. 743.

[2] 1823, 2 S. 216.

[3] 1665, M. 10, 925.

proceeded from him) in so far as he stood in the original proprietor's (and granter's) right. And as the true representation of that original proprietor was just the *de quo quaeritur*, the Court held that in a competition between heirs, the possession of a liferenter, whose right had flowed from the defunct to whom both pretended to be heirs, was not profitable to either to the prejudice of the other; and that the liferenter's possession should be interpreted to be the possession of him who should be found the lawful and righteous heir. But the possession of a liferenter by reservation is not to be accounted the possession of the fiar.[1]

Conjunction of possession.

Where there is an habile feudal title preceding the forty years' possession, and where the party pleading prescription can connect his own possession with that investiture even in the person of another, his own possession may be conjoined to that of his author so as to make up the requisite prescriptive period. One who was infeft on a general conveyance from another (who was infeft and possessed as institute under an invalid entail), and who completed the years of possession in his own person, was held entitled to conjoin his possession to his author's, and thus connect with that author's infeftment so as to instruct a good prescriptive title against trustees who had executed the invalid deed of entail, and claimed that they were entitled to reduce it and execute a valid one.[2] According to Mr. Erskine,[3] 'No part of the 'possession of a singular successor, upon a bare personal right, 'as a charter or disposition, can be computed to make up the 'years of prescription. And this is also the case of an heir's 'possession before he hath completed his titles by sasine; 'because such possession by the heir is grounded barely on the 'right of apparency, and not upon sasines.' But this interpretation of the statute has not been adhered to by the Court,

[1] *Marquis of Clydesdale* v. *Earl of Dundonald*, 1726, M. 1262.

[2] *Earl of Eglinton* v. *Eglinton*, 1861, 23 D. 1369.

[3] *Institutes*, 3. 7. 5.

which has more than once held that, where charter and sasine are produced as the title to which possession is ascribed, it is enough for the heir or singular successor to prove possession for forty years by persons who can connect themselves with that charter and sasine, and that it is of no moment whether that connection be established by deeds clothed with infeftment, or by deeds merely personal, or even by simple apparency.[1] The Court will even allow a party to feudalise a personal right *pendente lite*, in order that his alleged connection with the original infeftment may be made plainer.[2] But a distinction must be drawn between these cases, where the title pleaded upon was the first alternative allowed by the statute, viz., charter and sasine,—where, *i.e.*, there is direct evidence that the author or ancestor had himself a title fit in its own nature for vesting the property in him,—and those other cases where the party pleading prescription produces the second alternative title, viz., bare sasines, one or more, proceeding upon retour or precepts of *clare constat*,—where, *i.e.*, there is merely a reasonable presumption of an original title. If the first heir infeft upon this second alternative title complete forty years' possession in his own person, he has undoubtedly established an unassailable prescriptive right which his heir in apparency may plead upon, not in virtue of his own but of his ancestors' possession. But if the first heir infeft on a bare sasine have not himself possessed for the full prescriptive period, his heir, in order to conjoin his possession to his ancestor's, so as to make up the necessary tale of forty years, must renew the infeftment in his own person.[3] Such is the construction placed upon the words, 'sasines one or more standing 'together.' But when the heir-apparent has made up a feudal title, the years of possession on a bare apparency are reckoned

[1] *Middleton* v. *Earl of Dunmore*, 1774, M. 10, 944; *Earl of Marchmont* v. *Earl of Home*, 1724, M. 10, 797; *Caitcheon* v. *Ramsay*, 1791, M. 10, 810.

[2] *Crawford* v. *Durham*, 20 Dec. 1822, F. C.

[3] *Earl of Argyle* v. *M'Naughton*, 1671, M. 10, 791.

as years of possession on a habile title, and are counted as part of the prescriptive period. Nay, if there be an interval of apparency, no matter how long, between two periods of possession upon such infeftments, the years of that interval are included in the calculation of the term of possession.[1] The singular successor of one whose title was a bare sasine may, equally with an heir, conjoin his possession to his author's, if the connecting link be clothed with infeftment.[2]

Vesting by survivance.

The Act 37 and 38 Vic. c. 94, sec. 9, provides that 'a personal right to every estate in land descendible to heirs shall, 'without service or other procedure, vest or be held to have 'vested in the heir entitled to succeed thereto by his survivance 'of the person to whom he is entitled to succeed . . . and 'such personal right shall, subject to the provisions of this Act, 'be of the like nature and be attended with like consequences, 'and be transmissible in the same manner as a personal right 'to land under an unfeudalised conveyance, according to the 'existing law and practice.' Possession on apparency thus disappears from our system. But it is conceived that this enactment makes no alteration in the law as above stated with reference to the possession of heirs before their infeftment, or to the distinction between the alternative titles allowed by the Act 1617, c. 12.

[1] *Nielson* v. *Erskine*, 1823, 2 S. 216.

[2] *Purdie* v. *Torphichen*, 1739, M. 10, 796; *Millers* v. *Dickson*, 1766, M. 10, 937; *M'Neill* v. *Macneal*, 1858, 20 D. 735.

CHAPTER VI

OF PRESCRIPTION IN CASES OF DOUBLE TITLE

Erse., *Prin.*, 3. 7. Note A by Mr. Moir (17th edition).

The effect of the positive prescription is to make a certain feudal title unchallengeable in competition with another feudal title, and hitherto we have observed its operation in cases where the competing titles have existed in the persons of different parties. But there may be two distinct investitures upon either of which the same man may base his claim to a property, and we are now to inquire into the operation of prescription in such a state of matters. It may be the most convenient course to examine the leading cases, and to endeavour to gather from that examination the principles to which they seem to point. Two titles in one person.

In the case of *Innes* v. *Innes*,[1] the estate of Auchluncart was destined to heirs-male by an onerous bond of entail in 1641. In 1649, Walter Innes, the institute of entail, having acquired some expired apprisings of the property, took the rights thereof to heirs whatsoever. In 1695, a competition arose between the heir-male and the heir of line. The heir of line (defender) proponed the plea of prescription against the pursuer's claim to the property (1) *negative*, to the effect that the pursuer's right had been cut off, no document having been taken nor diligence done upon it within forty years, and (2) *positive*, the lands having been possessed by him for forty years after Mr. Walter Innes had taken the right to heirs whatsoever. The *Innes of Auchlun cart.*

[1] 1695, M. 11, 212.

Court held that, while the negative (or privative) prescription did not cut off the bond of entail, the positive prescription did; and they repelled the pursuer's plea of *non valens agere* on the ground that an heir-of-entail has a *jus agendi*.

Mackerston case.

In the *Mackerston* case,[1] the facts were these. In 1669 Macdougal of Mackerston settled his estate upon his son Thomas and the heirs-male of his body by a simple destination containing a power to alter. Thomas (I.) was infeft and possessed upon this title till his death, when his son Henry was infeft as heir to his father in the same investiture, and so possessed till his death in 1722. In 1715 he had settled the estate by bond of tailzie in favour of himself and the heirs-male of his body, whom failing, to his daughter Barbara and the heirs-male of her body, whom failing, to his younger brother William (passing over an intermediate brother Thomas (II.), and so forth. Barbara, served heir to Henry, was infeft in terms of the above settlement, and so possessed till 1738. In that year William, her father's youngest brother, discovered a bond of tailzie, of date 1684, bearing to be an exercise of the power to alter contained in the disposition of 1669, and settling the estate upon Thomas (I.) and the heirs-male of his body, with stringent irritant, resolutive, and prohibitory clauses. Upon this bond William, as representing his elder brother, proceeded to found a title to the estate; and his claim was met by Barbara with the plea of prescription proponed *positivé* to the effect that the estate had been possessed upon the settlement of 1669 down to 1738, and *negativé* to the effect that the bond of entail, having lain dormant from 1684 to 1738, was cut off. The Court sustained both pleas, and the decision is a precise application of the terms of the statute 1617, c. 12. On the one hand there was possession upon a feudal title adverse to another competing title, which—though it too afforded the immediate right of possession to the party holding on the other investiture—afforded a legal right to others to interrupt the

[1] *Macdougal* v. *Macdougal*, 1739, M. 10, 947.

possession as held. On the other hand, the action competent to the heirs of entail, being of the nature of document taken on an obligatory contract, and not of a direct declarator of property, necessarily fell within the scope of the second portion of the Act. The same view was taken in *Douglas* v. *Douglas*.[1] In *Ayton* v. *Monypenny*,[2] it is true, the Court, having upon a similar state of facts repelled the plea of negative prescription, proceeded to complicate the error by also repelling the plea of positive prescription, on the ground that the one plea was the inseparable counterpart of the other. But the House of Lords, by reversing this judgment, upheld the authority of the previous decisions.

More modern cases.

Among more modern cases to the same effect may be mentioned *The Duke of Hamilton* v. *Westenra*,[3] and *Hope Vere* v. *Craigiehall*,[4] where an heir of entail in possession destined the lands, by a marriage-contract which referred to the entail, to a different series of heirs from that specified in the entail. Possession for more than forty years followed on the disposition in the marriage-contract, which was accordingly held to be the governing investiture. The reference to the entail imported nothing, and the substitute under the entail had lost the power of challenging the new disposition *non utendo*. The decision in *Paterson* v. *Purves*[5] was the same in an almost identical state of facts. In *Macdonald* v. *Lockhart*,[6] a deed of entail specially referred to a previous marriage-contract which it professed to implement. The marriage-contract contained a clause excluding heirs-portioners, which the entail omitted. Possession followed on the infeftment on the entail for more than forty years. The last heir of entail left two daughters, between whom arose a question as to the right to the lands. It was held that the daughters succeeded as heirs-portioners in terms of the subsisting investiture which had been fortified by prescription, and

[1] 1753, M. 10, 955.
[2] 1756, M. 10, 956.
[3] 1827, 6 S. 44.
[4] 1828, 6 S. 517.
[5] 1823, 1 S. App. 401.
[6] 1842, 5 D. 372.

that the right of action to reduce the entail and enforce the obligations contained in the marriage-contract had been cut off by the second portion of the Act 1617, c. 12.

In all these cases adversity of interest.

In all these cases there are two competing and adverse infeftments; in all there is the right to disturb possession on the title to which possession is being palpably ascribed; in all there is that something 'expressly contrary to the right against 'which prescription is pleaded' which is necessary to render 'the 'lapse of forty years of importance.' For to make out a party to be free from the obligation to possess under a particular deed, 'it must be shown that during the forty years that obligation was 'denied, so that after forty years a right against such obligation 'has been made good by positive or negative prescription.'[1]

In all these cases, moreover, two familiar principles are implicit: (*a*) A *feudalised* adverse title is absolutely necessary to found a plea of prescription. Where a man has right to lands under two titles, one unlimited, the other limited, and does not make up a title upon either, but possesses for forty years upon apparency, the limited title is not extinguished by prescription (for possession cannot be ascribed to any adverse title) but remains the preferable and governing title. The only infeftment that can be appealed to by the heir in possession is that of his ancestor, qualified, as that is, by the limited title.[2] (*b*) A right cannot be prescribed by possession in defiance of the title to which that possession is attributed. A party was heir under two different entails. Entail No. 2 was not affected by the limitations in entail No. 1, but No. 2 contained a clause declaring that it should not prejudge any other right or title to the lands, but that they might be possessed 'without extinction, 'innovation, or confusion of rights . . . *accumulando jura juribus.*' The lands were possessed for more than forty years under No. 2. It was found that that clause preserved No. 1 to all

[1] *Cuninghame's Trustees* v. *Cuninghame*, 1852, 14 D. 1065, p. Lord-Justice Clerk Hope, p. 1076.

[2] *Welsh Maxwell* v. *Welsh Maxwell*, 1808, M. *voce* Prescr., App. 22; *Lumsdaine* v. *Balfour*, 13 June 1811, F. C.

intents and purposes, and prevented prescription running against it, and that an heir of entail whose predecessors and himself had possessed under No. 2 was entitled to attribute his possession to No. 1.[1] A deed of entail contained an obligation on the heirs to insert *verbatim* in all subsequent charters, etc., its whole conditions, limitations, and irritancies. The investitures, though they fulfilled this obligation to a certain extent, and referred to the entail as the title of possession, differed from the entail in the resolutive clause, and in a question with creditors the entail as set forth in the investiture was held to be invalid. But, *inter haeredes*, it was held that the entail was not extinguished by possession for the prescriptive period in terms of the defective investiture, which referred to the entail as the title of possession.[2] A party executed a deed of entail containing a substitution *haeredibus nominandis*, and reserved a power to alter the succession. He afterwards made a deed nominating heirs preferably to other heirs, called after the substitution *haeredibus nominandis*. The estate was possessed for forty years without reference to the deed of nomination. It was held that the deed of nomination was not extinguished by prescription, for that *haeredes nominandi* were precisely in the position of other contingent heirs, and that the contingency was purified by the execution of the deed of nomination. The heir under that deed was therefore found preferable to an heir called under a posterior substitution.[3]

Cases where no adversity of interest.

We now turn to the cases in which there is no such collision, or adversity of interest between the two titles.

In 1671 James Carbarn disponed his estate to Thomas, his eldest son, and the heirs of his body; whom failing, to James, his second son, and the heirs of his body; whom failing, to the

[1] *Dalyell* v. *Dalyell*, 17 Jan. 1810, F. C.

[2] *Cuninghame's Trustees* v. *Cuninghame*, 1852, 14 D. 1065.

[3] *Stewart* v. *Porterfield*, 1821, 1 S. 5; 1829, 8 S. 16; 1831, 5 W. & S. 515.

Smith and Bogle.

heirs of the body of his own second wife. Thomas, ignoring this disposition, made up titles to the estate as heir of his father, and was succeeded by his brother James, who made up titles as heir to Thomas. James conveyed the estate to his own heir-at-law, altering the destination to the heirs of Ann Johnston, his father's second wife. This destination of James's was quarrelled on the ground that he was fatuous and incapable of alienating. In reply it was argued that, admitting James's disposition to be invalid, possession by him and his brother for forty years on the title of heirs had established that investiture to the extinction of old Carbarn's destination and all claims depending thereon. The Lords repelled this plea of prescription.[1] Here there was no adversity of interest. It was admitted that old Carbarn's destination could be validly altered at any time. Not one of the heirs under it had a *jus crediti*, or could call upon the heir in possession to make up a title under the destination and possess thereon. The possessor could plead all titles, whether feudalised or not, against a third party challenging his possession. When old Carbarn executed his disposition, his reserved possession was in no sense running counter to, or prescribing against, the destination it contained, which, until revoked, continued to qualify his right. His heir, being *eadem persona cum defuncto*, possesses exactly his ancestor's right; and that right is still qualified by the destination, until the heir chooses to exercise his power of altering it. His making up titles as heir was in no sense a repudiation of his title under the disposition. The same course of reasoning is applicable in the Elsieshiells case,[2] where one who was heir both under the old investiture and under a separate but unfettered destination had made up his title under the old investiture only, and had then altered the destination. The validity of this alteration was questioned on the ground that

Elsieshiells case.

[1] *Gray* v. *Smith and Bogle*, 1752, M. 10, 803. See also *Durham* v. *Durham*, 24 Nov. 1802, F. C.; *Zuille* v. *Morrison*, 4 March 1813, F. C.

[2] *Edgar* v. *Maxwell*, 1736, M. 3089.

he ought, before altering, to have made up his title under the destination. It was, in fact, admitted by those who quarrelled the deed altering the destination, that if the granter of that deed had made up titles under the personal title, he would have been perfectly able to grant the conveyance, which, they alleged, the personal title prohibited him from doing. The alteration was held to be habile; and this judgment involved the admission, afterwards expressly made,[1] that every disposition or settlement containing a destination must continue to qualify a right until it is altered by the heir in possession, and that such an alteration is not implied by a possessor having served himself heir to the person last vested in the fee, instead of having made up titles on the disposition. On the other hand, where the heir expressly takes a new investiture, *e.g.* by resignation and charter, he is held to have repudiated the destination. He no longer stands in his ancestor's shoes; his ancestor's right is no longer qualified in him, for the qualifications have been swept away by a totally new infeftment.[2]

For the reasons just assigned, it is impossible to prescribe on one unlimited title to the extinction of another; and it is equally out of the question to prescribe upon a limited title to the extinction of an unfettered destination. An entail cannot be fortified by prescription so as to extinguish a fee-simple title.[3]

Panmure Leases case.

No better or more lucid statement of the doctrine of Double Title in relation to prescription is to be found than Lord Corehouse's judgment in the great Panmure Leases case.[4] There, no doubt, the doctrine of Double Title was applied to leases with very questionable propriety, as we shall hereafter see (*infra* p. 61). But the opinions about to be quoted are altogether independent of such an extension of the principle. 'Suppose a person,' says Lord Corehouse, 'to be infeft in a 'landed estate in fee-simple on a charter to himself and his

[1] *Snodgrass* v. *Buchanan*, 16 Dec. 1806, F. C.

[2] *Molle* v. *Riddel*, 13 Dec. 1811, F. C.

[3] *Lord Reay* v. *Mackay*, 1823, 2 S. 457; 1825, 1 W. & S. 306.

[4] *Maule* v. *Maule*, 4 March 1829, F. C.; 7 S. 527 and App. 41.

'heirs whatsoever, and that his son enters into possession on 'apparency, *i.e.* without renovating the title, in that case he 'may plead his father's title joined with his own possession to 'create a prescriptive right against any one claiming a better 'right than his father on whose title he founds. . . . But vary 'the case. Let the father as before be infeft in fee-simple, and 'then suppose that he makes a personal deed of entail to a 'different series of heirs, fenced with irritant and resolutive 'clauses, his eldest son being the first member of tailzie; in 'that case, if the eldest son enters into possession without 'making up a title, he could not found on his father's fee-'simple title and his own possession to cut off the personal 'deed of entail. To do this effectually he must have a title in 'his own person, or at least there must be a title adverse to, 'or independent of, his father's title, to which he can ascribe 'his possession. If it be a title in his own person, it is of no 'consequence whether it be completed by service or precept of '*clare constat* to his father; for after the lapse of the prescrip-'tive period there is no room to look back to the warrant of 'his infeftment. If he has an infeftment in fee-simple inde-'pendent of his father's, and forty years' possession, he has all 'that the statute 1617 requires. On the other hand, if he 'wants that independent title, it will not avail him though he 'should ascribe his possession by the most unequivocal acts to 'his father's fee-simple infeftment, in contradistinction to the 'personal deed of entail. Prescription is prevented not in con-'sequence of any quality in the possession, but from the want of 'a habile title. The personal deed which qualifies his father's 'infeftment is the *lex feudi*, until prescription has run on a 'different title from that infeftment. In the cases of *Macker-'ston*,[1] etc., and in every other case in which a personal deed 'of entail was found to be cut off by the positive prescription, 'possession invariably proceeded on an infeftment different 'from the infeftment of the maker of the personal deed. On

[1] 1739, M. 10, 947.

'the other hand, in circumstances precisely similar in every 'respect, except that the heir had no fee-simple title to found 'upon, save the fee-simple title of the maker of the entail, it has 'uniformly been decided that prescription did not run. That 'was the *species facti* in *Welsh Maxwell* v. *Welsh Maxwell*[1] and 'in *Lumsdaine* v. *Balfour*.[2] In the first of these, the positive 'prescription was not so much as pleaded; in the second, it 'was pleaded and overruled. And it will be observed that the 'judgment did not proceed on the ground that the heir had 'not *de facto* ascribed his possession to the unlimited title in 'the ancestor (in the case of *Lumsdaine* he had done so in the 'most unequivocal manner), but on the ground that there was 'no double title—that is, no title unqualified by the personal 'deed of entail.'

Ascription of possession.

Where prescription, then, operates in cases of double title, it is not that a man prescribes against himself, or his right leg against his left leg, but that one right prescribes against another distinctly adverse and competing right, though existing in the same person. In as much, however, as title *plus* possession is the statutory requisite for establishing a prescriptive right, it is obviously of very great moment to be able to determine to which of two titles existing in the same person possession is to be ascribed. Mr. Bell lays down, to begin with,[3] that where the titles are equally beneficial, the law presumes possession to proceed upon that which the possessor is under an obligation to adopt; but since the possessor is, *ex hypothesi*, under an obligation to adopt neither, that principle will not carry us very far. His second rule requires closer attention. 'Where 'one title is more beneficial than another, possession *in dubio* 'is to be ascribed to the more beneficial title.' This doctrine was first explicitly enunciated in *Oliphant Murray* v. *Ramsay*[4] by Lord President Blair. In *Maule* v. *Maule*[5] and in *Hunter* v.

[1] 1808, M. *voce* Presc. App. 22.
[2] 13 June 1811, F. C.
[3] Prin., § 2020.
[4] 17 Jan. 1811, F. C.
[5] 1829, 7 S. 527 and App. 48.

Smith,[1] Lord Mackenzie combated this view with great vigour. In all cases of double title, he contended, it must be made out by proof, in point of fact, that the possession was by virtue of the unlimited title to the total exclusion of the limited one. But the correctness of Lord President Blair's view was taken for granted by Lord Cuninghame in *Dalrymple* v. *Earl of Stair*,[2] and has been expressly and emphatically affirmed in the recent case of *The Earl of Glasgow* v. *Boyle*.[3]

Mr. Bell's third rule is, that in order to prescribe on an unlimited against a limited title, there must be a choice made of the former by an indication so clear as to create an independent and separate title capable of being fortified by possession. This maxim seems to be entirely at variance with the doctrine of presumption of possession. There is no doubt, however, and enough has already been said to show (*supra* p. 53), that when such a choice has been clearly and unmistakeably indicated prescription will be the effect of possession for the requisite period. It is no less certain that the explicit choice of the limited title excludes prescription.[4] It remains to be said that an heir who deliberately chooses to ascribe his possession to one rather than to the other of two titles existing in his person, is not therefore debarred, if necessity arise, from ascribing his possession to that other title against which prescription is running. It is equally available to him as a title to the property, though subject, *ex hypothesi*, to limitation. Every proprietor is understood to possess in virtue of all the collateral rights and titles in him to the same property. 'Where one 'has several rights in his person, prescription cannot be 'pleaded against any of them by a third party, because possession is available to preserve to the possessor any right in his 'own person.'[5]

[1] 1829, Napier, 274.
[2] 1841, 3 D. 837.
[3] 1887, 14 R. 419.
[4] *French* v. *Pinkstan*, 1835, 13 S. 743.
[5] Lord Kilkerran's report of *Smith & Boyle* v. *Gray*, 1752, p. 424. See also *Lord-Advocate* v. *Balfour*, 1860, 23 D. 147 (p. Lord Deas, 155).

'Prescriptive Consolidation.'

A word must now be said about 'Prescriptive Consolidation,' which Mr. Rankine specifies as a third and distinct function of the positive prescription,[1] but which, it is submitted, is merely a plain and straightforward application of the statute, which has in reality nothing to do with Consolidation, properly speaking, or with the doctrine of double title.

Elibank v. *Campbell.*

A conveyance of superiority in its scientific feudal form, bears to be a conveyance of the lands. Hence, as possession is the measure of the right conveyed, a superior's infeftment in the *dominium directum*, clothed with possession of the *dominium utile* for the prescriptive period, will vest in the superior a full right to the lands as effectually as an instrument of resignation *ad remanentiam*, or a minute of consolidation.[2] Suppose that a superior, after granting a feu-charter on which the vassal takes infeftment, not only continues to possess the lands but takes a reconveyance of them from the vassal during the running of prescription. Suppose, further, that the superior, without taking infeftment on the reconveyance, executes an entail of the whole estate, including *nominatim*, the lands in which the vassal stands infeft, and that the heir of entail, who is also heir to the unfeudalised disposition granted by the vassal, makes up his title by executing the procuratory of entail and obtaining a Crown charter; that succeeding heirs of entail make up their titles in like manner; and that their conjoined possession lasts for more than forty years. The heir in possession then takes infeftment upon the personal disposition and endeavours to sell the lands in it, on the ground that they had never been included under the entailed title. The heirs under the entail object to that transaction. Their objection will be sustained on the ground that the only title to which the heir in possession can attribute his possession of the lands is the entail, which debars him from

[1] *Land Ownership*, 3d ed., pp. 28, 61.

[2] *Earl of Dunmore* v. *Middleton*, 1774, M. 10, 944; 5 Br. Sup., 614.

alienating them. The expiry of forty years' possession upon that title extinguished the unfeudalised disposition altogether; possession could not be attributed to it; and the taking of infeftment upon it after the lapse of the prescriptive period was a meaningless act.[1]

Earl of Glasgow v. Boyle.

But suppose that the superior, instead of leaving his vassal's reconveyance unfeudalised, had taken infeftment upon it; that he had executed an entail and made up titles under it; that forty years' possession afterwards took place; and that the heir in possession then desired to sell the lands. It will be vain for the heirs under the entail to object. For the heir in possession may attribute his possession to each or all of his titles; he has in his person two equally habile and perfectly distinct feudalised titles, the vassal's reconveyance, and the entail of the lands, to either of which he may ascribe his possession (for consolidation does not act *ipso jure*[2]); if he has not hitherto given any clear and deliberate indication as to which title he chooses to possess on, there is a presumption that he possesses upon the more favourable one. He has, accordingly, an unlimited right to the lands, and may therefore dispone them. In such a case there is clearly no room for prescription.[3]

In *Waddell* v. *Pollock*[4] the heir under an old mid-superiority title of date 1714, who entered into possession of the *dominium utile* in 1763, and possessed for more than forty years, was held to have established by prescription a good right to the property in face of a marriage-contract of date 1754, whereby the *dominium utile* was conveyed to all the children of the marriage (of whom he was one) equally. In *Walker* v. *Grieve*[5] A was infeft in lands on a precept in a feu-contract in 1730. In 1735 A's

Walker v. Grieve.

[1] *Lord Elibank* v. *Campbell*, 1833, 12 S. 74. *Bontine* v. *Graham*, 1837, 15 S. 711; 1840, H. L. 1 Rob. App. 347.

[2] *Bald* v. *Buchanan*, 1786, M. 15, 084.

[3] *Earl of Glasgow* v. *Boyle*, 1887, 14 R. 419.

[4] 1828, 6 S. 999.

[5] 1827, 5 S. 442. See *Harvey* v. *Hamilton*, 1822, 1 S. 259.

superior disponed the lands to him, with an exception of the said feu-contract in the warrandice clause, and A was infeft in 1737 upon Crown charter of resignation and confirmation. Thus he was unlimited proprietor of two separate estates under separate and distinct titles. He conveyed to his son in 1749, who took infeftment on the precept and disponed in 1787 to his son, who took infeftment in like manner; and in 1813 obtained Crown charter of confirmation of all the titles whereby the lands had been held since the Crown charter of 1737. When a trustee in whom the estate had vested sold the property the purchaser objected to the title. But the Court held that the title was a good one. No doubt the *dominium utile* had never been taken out of the *haereditas jacens* of A. But any one who stood in right of it, and who might have attempted to assert that right, would be at once successfully met with the plea of prescription, based upon a good statutory title to the lands *plus* possession for forty years. All these cases, in short, and the others,[1] which so exercised Mr. Napier's mind, become perfectly intelligible and consistent when stripped of the considerations about adversity of title which make them seem complicated and contradictory in the reports. They are cases in which we see one title competing with another. The unsuccessful title doubtless affords a perfectly good right to property, which cannot be lost merely *non utendo*, and which might prevail over many others, but must agreeably to the statute be excluded by that highly privileged right, which is constituted by possession for the prescriptive period following upon a certain specified *ex facie* valid irredeemable title. It is the very purpose of the Act to destroy and extinguish such rights to property as were unsuccessfully asserted in those cases, and to fortify a particular species of right at their expense. Consequently, when the full prescriptive course has *not* run, it will be quite competent to explain that such and such a charter of the lands imports no

[1] *Bruce* v. *Bruce Carstairs*, 1770, M. 10, 805; *Wilson* v. *Pollock*, 1839, 2 D. 159.

more than a conveyance of the superiority, and a right to the *dominium utile* derived from an ancestor, who stood infeft in it, and in whose *haereditas jacens* it is still lying, will be preferred to the competing title.[1]

[1] *Marquis of Clydesdale* v. *Earl of Dundonald*, 1726, M. 1262.

CHAPTER VII

OF THE EXTENDED APPLICATION OF THE ACT 1617 c. 12

Leases.

'THE framers of the statute,' says Lord Corehouse,[1] 'when 'they introduced the positive prescription, had clearly nothing 'in view but feudal rights, where there is a title by infeftment. '. . . But in practice the statute has been extended to tacks, 'rights of teinds, patronage, etc., which do not admit of, or 'may not require sasine.' 'The Court of Session,' says Lord Kames,[2] 'preferring the end to the means, and consulting its 'own powers as a court of equity to prevent mischief, secures 'by prescription every subject possessed upon a good title; a 'right to tithes, for example, a long lease of land or of tithes, 'which are titles that admit not of infeftment.' It is, no doubt, quite possible to explain many of the cases in which prescription has been found applicable to leases by reference to the general clause of the Act. But in *Mure* v. *Heritors of Dunlop*,[3] the defender pleaded the positive prescription upon a tack of teinds followed by possession, and the Court explicitly sustained the plea; while possession for forty years upon a tack was held to validate it in *Carlyle* v. *Baxter*.[4] In the case of the Panmure Leases,[5] this novel application of the Act was carried to an extent to which Lord Balgray's epithet of 'incautious' seems far from inappropriate. The question there at issue was, substantially, whether possession for forty years upon an unfettered assignation to the leases of Brechin and Panmure sufficed, in virtue of the doctrine of double title, to extinguish

[1] *Maule* v. *Maule*, 1829, 7 S. 527 and App. 41.
[2] Prin. of Equity, p. 119.
[3] 1746, M. 10, 820.
[4] 1869, 41 S. J. 342.
[5] *Maule* v. *Maule*, 1829, 7 S. 527 and App.

an entailed assignation to the same leases, the right to which had come to be in another person. Lord Balgray at once put his finger upon the radically weak point in the plea of prescription. 'In feudal rights,' he said, 'no ambiguity arises 'from possession where two or more titles exist; the possession is fixed and determined by the infeftment, which again 'points out the title of possession: that title and that possession are pointed out to the world by regular publication 'where everyone may look, and everyone concerned is bound 'by the law to look. . . . But in personal rights all this stands 'very differently: there is nothing to mark the title of possession. If there are various personal titles and possession 'follows, no one can say on what title the party possesses: 'there is no promulgation to the world of the will and intention; there can be no indication of it; in such cases, if such 'separate titles can possibly exist from the same granter, 'the granter possesses equally upon the whole of them, and 'law supposes that he gives equal effect to the whole.'[1] Lord Corehouse, too, admitted that the doctrine of double title, even as applied to feudal rights, 'is intricate and involves nice 'distinctions: but when it is applied to rights which transmit 'without infeftment from the ancestor to the heir, the analogy 'is so unsatisfactory that it cannot be relied on.' Yet so convinced were he and the great majority of the Court, 'that a 'lease is a good title for the positive prescription,' that, in the face of a previous decision in the same case (5 March 1782), they insisted on applying that unsatisfactory analogy. Granting the major premise that the feudal clauses of the Act 1617 c. 12 are applicable to leases, it must be admitted that their decision was a logical and consistent interpretation of the doctrine of double title, for they found, with regard to the lease of Brechin, that a party holding a fee-simple assignation thereof in his own favour, and being also substitute under an entailed assignation of the same lease granted by the same

[1] 7 S. App. p. 15.

party, having held possession of the subjects for forty years, and done certain acts referring his possession to the fee-simple assignation, had acquired a prescriptive fee-simple right, and that the entailed assignation was extinguished; while with regard to the lease of Panmure, it was held that the same party having right thereto as heir of his father, and also as institute under an entail made by his father, and having possessed for forty years, must impute his possession to the entailed assignation, which qualified his father's right existing in him, and had not acquired a prescriptive fee-simple right to the lease.

Teinds constitute a separate estate from the lands, and may either be carried by sasine, or, where they have never been feudalised, by a personal right. When a right to teinds has been feudalised, the feudal clause of the statute is at once applicable. But how if it has not been feudalised? It was held in *Chatto* v. *Moir*,[1] that prescription was not pleadable where there had been no infeftment. But that decision has been overturned, and cannot now be considered law.[2] Whether a personal right to teinds clothed with possession will exclude a feudal right to the teinds on which no possession has followed, is a question which it would be unsafe to answer in the affirmative on the authority of *Learmonth* v. *Duke of Hamilton*.[3] In that case it is by no means clear that the right to teinds ever had been feudalised; the Court declined to enter upon the question whether teinds once feudalised must afterwards be held by feudal title; and all that the decision of the majority seems to come to is this, that the conveyance of a hypothetical right to teinds ('whatever right' the disponer 'had to the teinds') is as good for founding prescription by possession as an absolute conveyance. Certainly in *Earl of Fife* v. *Earl of Seafield*[4] it seems to have been taken for Teinds.

[1] 1745, M. 15, 657.

[2] *Gordon* v. *Kennedy*, 1758, M. 10, 825; *Irvine* v. *Burnet*, 1764, M. 10, 830; *Solicitor of Teinds* v. *Budge*, 1797, Hume, 455.

[3] 1829, S. Teind Cases, 192.

[4] 1831, S. Teind Cases, 254.

granted in the course of the argument, that in no circumstances could a personal prevail against a feudal title.

Title and Possession in Teinds.

Not a few of the cases which deal with prescription as affecting teinds afford excellent illustrations of the rules with regard to title and possession, which have been already discussed. The necessity for a habile title is shown in *Learmonth* v. *City of Edinburgh*,[1] where a charter of erection of certain lands into a burgh was held not to found a prescriptive right to teinds; in *Mackintosh* v. *Lord Abinger*,[2] where a pretended title to teinds was so ambiguous as to compel reference to previous infeftments, which showed that there was no right to teinds in the author; and even more strikingly in *Cheape* v. *Lord-Advocate*.[3] The proprietor of certain lands took a tack of certain teinds from the Crown, and tack-duty was paid for more than forty years. His successor discovered a conveyance of the teinds to one of his authors in 1629, and raised a declarator of his own right to the teinds. The Crown replied by the plea of prescription, founded on its own right *plus* possession through its tenant. The plea was repelled because the Crown produced no title to the teinds in question. Lord Benholme observed that the *jus coronæ* could not constitute a good title to teinds on which prescription could run; that whatever teinds are possessed by the Crown are held by singular and secondary title, derived mediately or immediately from the Church, and that in cases of positive prescription it is necessary to have a title which not only quadrates with the nature and evidence of possession, but is in its own terms capable of comprehending the subject possessed. Where the party who had right to teinds by a tack from the Crown disponed to another the lands and teinds, as possessed by himself, without mentioning the tack, the question was raised, but not settled, whether such a conveyance would afford a habile title for prescription.[4] But there is no doubt

[1] 1859, 21 D. 890.
[2] 1877, 4 R. 1069.
[3] 1871, 9 M. 377.
[4] *Speir* v. *Officers of State*, 1858, 20 D. 525.

whatever that one whose possession is due to a tack of teinds cannot prescribe a right to the teinds against his author.[1]

But a good title followed by possession is unassailable. A charter of resignation under the great seal followed by infeftment, in favour of a heritor of certain lands in a parish, who had a tack of the teinds, contained a grant of the patronage and teinds of the parish generally. The heritor had admittedly possessed only the teinds of his own lands uninterruptedly, and had applied to the Crown subsequently to the charter of resignation, but more than forty years before the action was raised, for a renewal of the tack of the teinds, which was not granted. It was held that the charter afforded a good prescriptive title in so far as followed by possession.[2] A final decree of locality is a good title, on which a minister may prescribe a right to stipend, if stipend has been paid for forty years under that decree,[3] and even to over-payments of stipend in excess of sub-valuations of the teinds. Nor is such title qualified by subsequent decree of approbation of the sub-valuation.[4] A minister's possession of over-payments on such a title will cut off the heritor's right to surrender his teinds upon the value as fixed by such decree of approbation.[5] But if the decree of locality has been reduced, the continuance of over-payments will not suffice to sustain the minister's right, for he has lost the title to which his possession was attributable.[6]

Again, possession may serve to interpret and illustrate an equivocal title. But where a claim to teinds was based on a title which the Court held was not a title for prescription, it was observed that even had the title been habile, it would not have been fortified by possession, for the alleged proprietor had

[1] *Straton* v. *College of St. Andrews*, 1756, M. 10,824.

[2] *Lord-Advocate* v. *Balfour*, 1860, 23 D. 147.

[3] *Bain* v. *Officers of State*, 1858, 20 D. 1006.

[4] *Maderty*, 9 July 1817, F. C. *Colquhoun* v. *Fogo*, 1873, 11 M. 919.

[5] *Colquhoun* v. *Fogo*, 1873, 11 M. 919.

[6] *Baird* v. *Minister of Polmont*, 1832, 10 S. 752.

paid stipend on the footing of not being heritable proprietor of the teinds.[1] Nor can prescriptive possession operate to extend a right in face of the express terms of the grant on which it depends. A decree of valuation of teinds is not a title upon which a proprietor can by possession acquire a right to the teinds of lands not originally included in the valuation.[2]

It may be remarked that a designation to a glebe by a presbytery, followed by possession, has been held to be a sufficient title to the glebe to exclude others.[3]

Patronage. Although by the Act 37 & 38 Vict. c. 82, the right of appointing ministers to vacant churches and parishes was vested in the congregations of such vacant churches and parishes respectively, it may be worth while to note the following cases as illustrative of general principles, premising that a right to patronage stood on very much the same footing with regard to prescription as a right to teinds. A grant of patronage was held to form a sufficient title on which, if followed by possession, to acquire a prescriptive right against the Crown, as coming in the place of the Bishop, to the patronage of parishes specially contained in the titles of the Bishopric.[4] But a grant of patronage, though followed by exercise of the right by the grantee, was found to be not a habile title for prescription, because qualified by a reservation of the Crown's right to present.[5] With reference to the necessity of a feudalised title, Lord Justice-Clerk Hope unequivocally laid down the law that a personal title clad with possession would constitute a sufficient prescriptive right to patronage, and pointed out that the feudalisation of the title was only important in the case of two competitors, for a right that had been feudalised in a common author. Lord Medwyn held that a personal title followed by possession, which did not connect with a feudal title, was not

[1] *Mackintosh* v. *Lord Abinger*, 1877, 4 R. 1069.

[2] *Macleod* v. *Paterson*, 1869, 7 M. 614; 1873, 11 M. H. L. 62.

[3] *Lord Panmure* v. *Halkett*, 1860, 22 D. 1357.

[4] *Lord-Advocate* v. *Lord Dundas*, 1830, 8 S. 755; 1831, 5 W. & S. 723.

[5] *Lord-Advocate* v. *Earl of Mansfield*, 1830, 8 S. 765.

habile, if the right had once been feudalised, to found prescription against a right that could so connect. Lord Moncreiff, on the other hand, held that any personal right clothed with possession was sufficient on which to prescribe, even against a feudal right.[1] The point was never determined. Since a minister might live for more than forty years after his presentation, and since during his incumbency the right to present could not be exercised, it was a nice point what acts of possession would suffice to build up a good prescriptive right to patronage. It was decided that at least two acts of presentation were requisite to instruct possession, and to afford the presumption that the possessor was possessing in the interval *animo dominii*.[2]

Servitudes.

While a negative servitude can be constituted only by grant,[3] a positive servitude may be constituted either by express grant, or by prescriptive possession. In the latter case no grant whatever is necessary, and the superior's consent to the servitude is presumed from his having used no acts of interruption.[4] A right of winter pasturage on stubble and lea lands, exclusive of the stocking of the servient heritor, was sustained upon the exercise of that right by the tenants of the dominant heritor for more than forty years, though there was no grant or even mention of the right in either title.[5] But, in conformity with the Act 1617, c. 12, a title must be produced; and a person can only have right to a servitude by producing a right to the dominant lands clothed with infeftment, to which possession of the right claimed may be referred. There must, then, in all servitudes proper be a dominant and a servient tenement, and there must be a habile title. A servitude, the right to which rests upon forty years' possession upon an infeftment in the dominant lands, is extinguished when the dominant and servient

[1] *Lord-Advocate* v. *Graham*, 1844, 7 D. 183.

[2] *Macdonell* v. *Duke of Gordon*, 1828, 6 S. 600.

[3] *Dundas* v. *Blair*, 1886, 13 R. 759.

[4] *Marquis of Breadalbane* v. *Campbell*, 1851; 13 D. 647.

[5] *Chatto* v. *Lockhart*, 1790, Hume, 734.

tenements come into the same hands, unless they continue to be held on separate titles, and the servitude does not revive, even if the tenements come to be again separated.[1] Where a claim to a right of servitude over one tenement was made by the proprietor of another, it was proved that the two tenements had come into the same hands in 1814, and had been possessed together till 1842. It was held that there were no *termini habiles* for prescription, for during that time prescription could not run in favour of one tenement against the other, and a proprietor's own use of his own property can never imply a grant against himself. *Res sua nemini servit.* Even if there had been any ground for saying that prescription was running prior to the union of the two properties, that union would interrupt the currency of prescription.[2]

Servitudes as enjoyed by burghs.

A grant of a burgh of barony is not in itself a sufficient title for the inhabitants of the burgh to prescribe a servitude of pasturage.[3] On the other hand (though in the *Fulkland* case [4] there was held to be no such thing as a servitude of bleaching) it was found that the charter of a Royal burgh was a good title on which to prescribe a servitude of bleaching clothes,[5] and in the case of Kelso, the claim of a burgh of barony to the same servitude was unsuccessful only because there had been no grant of lands to the incorporation which could serve as a dominant tenement.[6] The magistrates of a burgh may be taken to be the dominant heritors of a rural servitude for the use of the community.[7] The proprietor of a well closed it, and certain 'householders and inhabitants' of a village raised an action of suspension and interdict against him, on the plea of a prescriptive right to draw water from it. The note was refused in the case of all the complainers except one, who

[1] *Donaldsons' Trustees* v. *Forbes*, 1839, 1 D. 449; *Baird* v. *Fortune*, 1861, 4 MacQ. 127.

[2] *Gow's Trustees* v. *Mealls*, 1875, 2 R. 729.

[3] *Dunse* v. *Hay*, 1732, M. 1824.

[4] 1708 M. 10, 916.

[5] *Sinclair* v. *Magistrates of Dysart*, 1779, M. 14, 519.

[6] *Jaffray* v. *Duke of Roxburghe*, 1755, M. 2340.

[7] *Murray* v. *Town of Peebles*, 8 Dec. 1808, F. C.

averred that he was a feuar, and craved a diligence to recover his titles, which was granted.[1] There the feuar was obviously in a position to plead as the heritor of a dominant tenement which the 'householders and inhabitants' did not pretend to be. So an infeftment in a tenement with parts and pertinents was held a sufficient title on which to found a prescriptive right to a servitude of drawing water, and all inquiry into previous titles was excluded.[2] When certain fishermen founded on prescriptive use and possession of the sea-shore with a view to having a servitude found to exist as at common law, it was held that their possession must be ascribed to the Act 29 George II. c. 23, which specially allowed them to use the sea-shore for the purpose of their trade, and therefore that they could not prescribe a right to such servitude.[3] In an action to establish a right to drove-road and stances with pasturage for cattle, the House of Lords, reversing the decision of the Court of Session, refused to listen to the suggestion that the right to the pasturage or stances could be accessory to a right of public way which they held had been established. The right to stances could only be instructed as a servitude, which implied a dominant and a servient tenement, and none of the pursuers claimed to be heritor of any such dominant tenement.[4]

Possession must be unequivocal.

While there must be an infeftment in the dominant lands to supply a foundation for a prescriptive right to a servitude, there must be unequivocal possession for forty years[5] to complete it. Possession will be the precise measure of the right acquired, and the maxim *tantum praescriptum quantum possessum* will be strictly applied, unless without some slight extension of the former usage the right would be unprofitable to the acquirer.[6] Uninterrupted possession for forty years may

[1] *Mackenzie* v. *Learmonth*, 1849, 12 D. 132. See, too, *Henderson* v. *Earl of Minto*, 1860, 22 D. 1126.

[2] *Brand* v. *Charteris*, 1841, 4 D. 292.

[3] *Cameron* v. *Ainslie*, 1848, 10 D. 446.

[4] *Marquis of Breadalbane* v. *M'Gregor*, 1846, 9 D. 210; rev. H.L. 7 Bell's App. 43.

[5] 37 & 38 Vict. c. 94, § 34.

[6] Ersk., *Inst.*, 2. 9. 4; *Gairlton*, 1677, M. 14, 535; *Bruce of Kennet*, 1741, Elchies, 'Servitude,' 2.

even avail sometimes slightly to extend the scope of a servitude beyond the original grant.[1] But no amount of possession will suffice to establish a right to a servitude not recognised as such in the law of Scotland, *e.g.* a *jus spatiandi*,[2] or the exclusive use of a common subject.[3] In the *Earlsferry* case,[4] the rubric runs that the burgh of Earlsferry has a servitude of golfing over the Ferry links; but Lord Eldin in his first note expresses a doubt whether 'the rights which the magistrates and inhabi-'tants have been exercising may be called servitudes,' and in his second note he seems inclined to hold that the property of the links was in the burgh; which would bring the case into the category of *Sanderson* v. *Lees*.[5] (*supra* p. 31). At all events, this one decision is scarcely sufficient ground for holding that a servitude of golf may be acquired over lands by the constant playing of the game on them for forty years; though a servitude of recreation for the use of inhabitants and 'others,' expressly reserved by the magistrates of a Royal burgh in a charter of certain lands granted by them has been sustained, and may be vindicated by the inhabitants individually.[6]

Thirlage.

It is to be observed that, as a general rule, a title in writing is required in order to constitute the servitude of thirlage by prescription.[7] But the mills belonging to the Crown, or to church lands, may acquire a right to the servitude by possession alone; and payment of dry multures (*i.e.* of duties in grain or money paid whether corn be ground or not) for the prescriptive period will of itself imply a title,[8] as will also payment of insucken multures accompanied by 'services.'[9] Unequivocal use of the servitude by payment of insucken multures will serve to bolster up titles which contain no

[1] *Forbes* v. *Wilson*, 1724, M. 14, 505.

[2] *Dyce* v. *Hay*, 1849, 11 D. 1266; 1 MacQ. 305.

[3] *Leck* v. *Chalmers*, 1859, 21 D. 408.

[4] *Magistrates of Earlsferry* v. *Malcolm*, 1829, 7 S. 755.

[5] 1859, 22 D. 24.

[6] *Cleghorn* v. *Dempster*, 1805, M. 16, 141.

[7] *Harris* v. *Magistrates of Dundee*, 1863, 1 M. 833.

[8] *Kinnaird* v. *Drummond*, 1675, M. 10, 862.

[9] *Lord Broughton*, 1745, Ersk., 2. 9. 29.

express grant of thirlage, *e.g.* the grant of a barony mill with multures, or with pertinents.[1] The occasional carrying of astricted corns to another mill is not necessarily an interruption of prescription. (See Ersk., *Inst.*, 2. 9. 28-30.)[2]

[1] *Earl of Hopetoun* v. *Bathgate Brewers*, 1753, M. 16, 029; *Bruce* v. *Stein*, 1769, M. 16,061.

[2] Certain minor rights, which it is not very easy to classify, are also, when feudalised, susceptible of the positive prescription—*e.g.* the right and privilege 'of one tide's fishing of salmon yearly.' *Murray, etc.*, v. *Peddie, etc.*, 1880, 7 R. 804; Rankine on Land Ownership, p. 30.

CHAPTER VIII

OF PRESCRIPTION OF CERTAIN RIGHTS INDEPENDENT OF THE STATUTE, AND IN PARTICULAR OF PUBLIC RIGHT-OF-WAY

Immemorial possession without title.

HITHERTO we have considered prescription as proponed in terms of the feudal clause of the Act 1617, c. 12. But there are certain cases where prescription was undoubtedly applied to fortify a right, but which cannot even with an effort be brought within the scope of that statute, for their leading characteristic is that immemorial possession (for which forty years' possession 'is taken as being in general a sufficient 'equivalent')[1] is enough to establish a right without any antecedent title whatever. To explain these cases we must fall back upon the hypothesis of some common-law doctrine of prescription existing prior to the legislation of 1617.

Prescription at common law.

Thus, though no title was libelled but possession, the Lords sustained a claim to a servitude.[2] Where the members of a friendly society had for more than a century exercised the right of levying dues for the hire of mortcloths, etc., used for a burying-ground, there having been no grant of such right, it was held in a question with the heritors and kirk-session that the society was entitled to continue to exercise the right.[3] Where parties have for a long time past the forty years enjoyed possession of seats in a parish church, under some title or other not plainly discoverable, it is not competent to dis-

[1] *Davidson* v. *Earl of Fife*, 1863, 1 M. 874 (p. Lord J.-C. Inglis).

[2] *Neilson* v. *Sheriff of Galloway*, 1623, M. 10, 880. Cf. *Knockdolian* v. *Tenants of Partick*, 1583, M. 14, 541; *Henderson* v. *Wemyss*, 1672, 2 Br. Supp. 706.

[3] *Kirk-session of South Leith* v. *Scott, etc.*, 1832, 11 S. 75. See *Paisley* v. *Wrights' Incorporation*, 1761, M. 1956, and Lord Deas's judgment in *Traill* v. *Dangerfield*, 1870, 8 M. 579, 588.

possess them after a mere repair and reseating of the church.[1] In *Saunders* v. *Hunter*,[2] it was held that a proprietor on a bounding charter with no clause of parts and pertinents could not by mere possession acquire right to a servitude over lands outside the limits of his charter. Lord Fullerton expressed a contrary opinion in *Liston* v. *Galloway*,[3] and his view was expressly given effect to in *Beaumont* v. *Lord Glenlyon*.[4]

Now the decision in *Beaumont*, it would seem, cannot be based on the Act 1617, c. 12, for there was no feudal title to which possession could be ascribed. Possession was rather in defiance of the terms of the title; and, indeed, it might plausibly be contended that the prescription of servitudes in general is independent of statute.[5] In *Hunter & Aikenhead* v. *Aitken*,[6] it was expressly said that a right not founded on any grant in the titles of the parties to interrupt the flow of water in a stream by storing it in a dam rested 'entirely 'upon possession for the prescriptive period,' and was acquired by such possession; and therefore might equally be lost by non-user or non-possession during the subsequent prescriptive period. In *Heggie* v. *Nairn*,[7] the question was raised, but not decided, whether a lower heritor on a stream could by use for the prescriptive period acquire right to water which had from time immemorial been artificially discharged into the stream from a mine, so as to entitle him to prevent its diversion. But whatever right to interrupt the flow of a stream may be acquired by possession, no such right as that of obstructing a public or servitude road, by from time to time placing obstructions upon it, can be acquired by mere use of that practice continued for forty years.[8] Prescription has also been applied to fortify grants in no wise feudal, and presenting no analogy to

[1] *Magistrates of Hamilton* v. *Duke of Hamilton*, 1846, 8 D. 844; H. L. 7 Bell's App. 1.

[2] 1830, 8 S. 605.

[3] 1835, 14 S. 97.

[4] 1843, 5 D. 1337.

[5] 1623, M. 10, 880.

[6] 1880, 7 R. 510 (p. Lord Shand, 519).

[7] 1882, 9 R. 704.

[8] *Stewart* v. *Brown Brothers*, 1878, 6 R. 35.

those contemplated by the Act 1617, c. 12. The magistrates of a burgh made an onerous contract with a society of brewers that two brewers elected by the society should be admitted members of the Guild Council. This contract *plus* forty years' possession was held to give the brewers a prescriptive right to elect two of their number members of the Guild Council.[1]

Public right of way.

But by far the most important class of cases referable to an old common-law rule of prescription and not to the statute is that which is concerned with public right of way. It has, indeed, been attempted to bring that species of right under the Act 1617, c. 12, by the hypothesis of an implied grant to which possession is to be referred, or of a right vested in the Crown to the benefit of which the public is entitled. But, though Lord J.-C. Hope spoke of the presumption that such a right has been granted as being the condition of its establishment by possession,[2] Lord J.-C. Inglis, twelve years later, expressed grave doubts as to the applicability of the statute,[3] and the matter may be said to have been definitely settled by the emphatic judgment delivered in *Mann* v. *Brodie*[4] by Lord Watson, who said:—'According to the law of Scotland, 'the constitution of a right of public road does not depend 'upon any legal fiction, but upon the fact of user by the public 'as matter of right, continuously and without interruption, for 'the full period of the long prescription. . . . I am aware that 'there are *dicta* to be found in which the prescriptive acquisi-'tion of a right of way by the public is attributed to implied 'grant, acquiescence by the owner of the soil, and so forth; 'but these appear to me to be mere speculations as to 'the origin of the rule.' A public right of road is, therefore, something totally distinct from a servitude right of road. The former admits, the latter excludes the public.[5] A public right

[1] *Gray* v. *Guildry of Arbroath*, 1823, 2 S. 113. Cf. *Skirving* v. *Smellie*, 1803, M. 10, 921.

[2] *Napier's Trustees* v. *Morrison*, 1851, 13 D. 1404.

[3] *Davidson* v. *Earl of Fife*, 1863, 1 M. 874.

[4] 1885, 12 R. H. L. 52.

[5] *Thomson* v. *Murdoch*, 1862, 24 D. 975, p. Lord Deas; *Jenkins* v. *Murray*, 1866, 4 M. 1046.

of way, moreover, excludes the idea of a dominant tenement to be benefited by the right. Hence, three persons, residing in different towns, at a considerable distance from the disputed road, who averred no local connection with the district, or special interest in the road, further than that they and their fellow-citizens had been in immemorial use to travel along it, were held to have sufficient title to sue in a declarator of right of way.[1] When an action of declarator brought to establish a public right of way is tried upon the issue whether there is a right of way or not, the verdict on that point, when allowed to become final, is a conclusive settlement of that question, and is *res judicata* against the whole public.[2]

Conditions of possession.

The conditions of use and possession requisite to instruct a right of public way are stringent but very plainly laid down. 'The essential thing is the open assertion of the right, and if a 'path is used in such a way that the right to use it is asserted, 'the proprietor must stop the path if he wishes to preserve his 'rights.'[3] The use of the road must be such as to instruct right, and to exclude the idea of mere tolerance.[4] The uninterrupted use for forty years of a path made originally by the proprietor for his own convenience will not suffice to instruct a public right of way.[5] At the same time, obstruction of the road to which right is alleged is a weapon which may be turned against the proprietor using it; for there can be no better proof of an assertion of a right of way than the repeated demolition of obstacles set up to exclude the public.

Entry and ish

Furthermore, to constitute a public right of way through a

[1] *Torrie* v. *Duke of Athole*, 1849, 12 D. 328; H. L. 1 MacQ. 65 (see judgment of Lord St. Leonards), 24 S. J. 478; *Breadalbane* v. *M'Gregor*, 1846, 9 D. 210, 1848, 7 Bell's App. 43.

[2] *Jenkins* v. *Robertson*, 1864, 2 M. 1162; rev. 1867, 5 M. H. L. 27: *White* v. *Earl of Morton's Trustees*, 1866, 4. M. H. L. 53.

[3] *Cuthbertson* v. *Young*, 1851, 14 D. 300 (p. Lord J.-C. Hope).

[4] *Jenkins* v. *Murray*, 1866, 4 M. 1046; *Burt* v. *Barclay*, 1861, 24 D. 218; *Napier's Trustees* v. *Morrison*, 1851, 13 D. 1404. See, too, *Scottish Rights of Way Society* v. *MacPherson*, 1887, 14 R. 875; 1888, 15 R. H. L. 68.

[5] *Napier's Trustees* v. *Morrison*, 1851, 13 D. 1401.

at public places.

proprietor's grounds, the public must go through the grounds from an entry at one place to an ish at another; 'it will not 'do for people to enter the ground of a proprietor and walk 'about in it as much as they choose, and come out where they 'entered' (p. Lord Curriehill); and the points where ish and entry are must be public places.[1] A public place, in the proper sense of the term, is 'a place to which the public resort for 'some definite and intelligible purpose.'[2] But the question whether the *terminus* of an alleged public way is a public place does not arise when the allegation is that the way goes beyond that *terminus*, so to speak, over another's land to a public place. It is enough if the public get legally away from the intermediate place somehow.[3] But suppose a path runs from A to B through the lands of X, and on from B to C, undoubtedly a public place, through the lands of Y. An action of declarator of public right of way from A to B is brought against X, without Y being called. After proof led, the jury finds that there is a public right of way from A to B, which it is not contended is a public place in any other sense than that the public can get legally therefrom to C; and this decision, becoming final, is consequently *res judicata* as far as the road from A to B is concerned. But A . . . B can only be a public road because B is a public place; and B is only a public place because B . . . C is a road along which the public can legally proceed to C. Now, if Y suddenly disputes the right of the public to travel over his lands from B to C, the decision in the case of the path A . . . B cannot be *res judicata* against him, so as to afford an immediate answer to all objections he may bring against the pursuer's claim in an action brought against him to vindicate a public right of way from B to C, and if Y successfully defeats the claim to a public right of way, then over X's lands there exists a public right of way from A to B

[1] *Jenkins* v. *Murray*, 1866, 4 M. 1046.

[2] *Duncan* v. *Lees*, 1871, 9 M. 855 (p. Lord-President Inglis).

[3] *Campbell* v. *Lang*, 1851, 13 D. 1179; H. L. 1 MacQ. 451.

though B has lost its sole title to be considered a public place; which according to the law of Scotland is absurd.

Definite track.

Once more, the right claimed must be a right 'in some definite 'and ascertained track' (p. Lord President Inglis). 'The mere fact 'of people going for more than forty years in a certain direction 'does not necessarily infer a right of public road. . . . It is a 'possible thing that even through the wildest desert there may 'be a public footpath, but there must be something to mark 'the fact that it is a public footpath and is used as a matter of 'right' (p. Lord Deas). 'If there has been for the prescriptive 'period a walking along a definite line from one public place 'to another, in the assertion of a right to use that line, that 'may make the foundation of a right of way to be declared by 'competent authority in a court of law' (p. Lord Ardmillan).[1]

But where there had been extensive encroachments by a navigable river on its banks, throwing back the line of road, and where there had been deviations and substitutions in other portions of the road during the prescriptive period, it was nevertheless held that there was evidence of sufficient use for forty years to establish a public right of way. The rule which requires use for forty years has no application to a substitute road provided in lieu of a previous public road, and consent to the use of the substituted road by the public amounting to acquiescence will create a right to the new road.[2]

Possession the measure of the right.

The maxim *tantum praescriptum tantum possessum* is applied.[3] Where the whole of a road was not fitted for carriage traffic, but only a part, it was held not to be a carriage road, but only a public road for walking or riding.[4] But where a public road had been used for more than forty years for carrying burdens, etc., on horseback, and for carts and carriages since their introduction, which was within the forty years, it was

[1] *Mackintosh* v. *Moir*, 1871, 9 M. 574.

[2] *Hozier* v. *Hawthorne*, 1884, 11 R. 766.

[3] *M'Farlane* v. *Morrison*, 1865, 4 M. 257.

[4] *Mackenzie* v. *Bankes*, 1868, 6 M. 936; *Mitchell* v. *Brown*, 1826, 5 S. 56.

held that the road was subject to be used as a cart and carriage road.[1]

Must continue for forty years.

Possession must continue for the whole of the prescriptive period. But it need not be continuous up to the date of the raising of the action; and it is enough if possession for forty years be proved up to some date within the last forty years.[2] Accordingly the word 'immediately' in the phrase 'immediately preceding' the interruption, which was the occasion of the action being raised, was struck out of the issue in *Mercer* v. *Reid*.[3] So that an interruption within forty years of the action does not necessarily destroy the prescriptive right claimed, any more than an attempt to interrupt which has been successfully resisted.

The *solum* belongs to the proprietor.

Finally, in no case does the right of public way amount to more than a right of free passage. The *solum* of a public footpath belongs to the proprietor of the land through which it runs; and his right to erect gates across the path (not to obstruct the public, but for his own convenience) is consequently a right to make a certain use of his own property at his own pleasure, is *res meræ facultatis*, and is not liable to be extinguished by failure to exercise it.[4]

[1] *Forbes* v. *Forbes*, 1829, 7 S. 441.

[2] *Harrie* v. *Rodgers*, 1827, 5 S. 917; 3 W. & S. 251.

[3] 1840, 2 D. 520.

[4] *Sutherland* v. *Thomson*, 1876, 3 R. 485. See *Galbreath* v. *Armour's Trustees*, 1845, 4 Bell's App. 374.

CHAPTER IX

OF THE NEGATIVE PRESCRIPTION

(Bell, *Prin.*, §§ 605-627.)

What is called the negative prescription is, as we have seen, the plea of prescription proponed under the second portion of the Act 1617, c. 12, along with which must be taken the earlier statutes, 1469, c. 28, and 1474, c. 54. Mr. Erskine explains the operation of these statutes to be 'the loss or forfeiture of a right 'by the proprietor neglecting to exercise or prosecute it during 'that whole period which the law hath declared to infer the 'loss of it.'[1] Their effect is not merely to change the *onus probandi* or to limit the mode of proof, but to extinguish altogether the personal rights to which they apply, so that, even if the subsistence of the debt be referred to, and proved by, the debtor's oath after the expiry of forty years, he is nevertheless not liable. No action will lie on an obligation granted forty years before.[2] It is now settled that the negative prescription runs against the Crown,[3] as well as against private persons. Where, in answer to the production of an *ex facie* valid deed, it is alleged that the deed produced does not apply to the lands or rights in dispute, the lapse of forty years without action having been taken will not exclude proof of that averment, for the negative prescription 'will never prove the identity of one 'set of lands with another.'[4]

Totally extinguishes certain rights.

[1] *Inst.* 3. 7. 8.

[2] *Napier* v. *Campbell*, 1703, M. 10, 656; *Campbell* v. *Halket*, 1747, M. 11, 634. 1 Pat. App. 427; *Kermack* v. *Kermack*, 1874, 2 R. 156.

[3] *Deans of Chapel Royal* v. *Johnstone*, 1867, 5 M. 414; 7 M. H. L. 19.

[4] *Macleod* v. *Smith*, 1869, 7 M. 821.

But not rights of property.

While the general clause of the Act 1617, c. 12, is of a very sweeping nature, there is one class of rights which the mere lapse of time without pursuit will never extinguish. No right of property can be lost *non utendo*.[1] This important principle has too often been lost sight of, though it was early recognised by the Court. Nothing could be plainer than the decision in the *Presbytery of Perth* v. *Magistrates of Perth*,[2] to the effect that the negative prescription is no answer to a direct declarator of property. In *Paton* v. *Drysdale*,[3] indeed, the rubric bears that the defender, not having been infeft, could not plead the negative prescription against the pursuer. But the action was for reduction of a deed on the ground of *ex facie* nullity, and to such an action it was rightly held that prescription did not apply. In the first of these cases the defender produced no title; in the second, there had been no infeftment. In both, therefore, all question of the positive prescription was excluded. It was the decisions in these cases that prompted Mr. Erskine's well-known dictum, that 'the negative prescription of heritable 'rights of property cannot be pleaded even by one who hath a 'title in himself proper to be the foundation of a positive pre-'scription, if it be not actually established in him by that pre-'scription; because the negative prescription confers no right 'on him who pleads it, but barely extinguishes that which is 'in the adversary; and consequently that none but he who 'hath in himself a full right of property in the lands can 'have any interest to plead against his party that he has 'lost his by the negative prescription, since by that plea his 'adversary's right cannot be transferred to himself.'[4] These remarks, which are indisputably true of prescription of 'herit-'able rights of property,' which is what Mr. Erskine is speaking about, have been strangely distorted, and have often been taken to apply to the negative prescription of all *obligations*. In

[1] See *Duke of Buccleuch* v. *Erskine*, 16 June 1812, F. C.

[2] 1728, M. 10, 723.

[3] 1725, M. 10, 709.

[4] *Inst.*, 3. 7. 8.

M'Culloch v. *Buchanan*,[1] the pursuer explicitly pleaded that because the defender could not plead the positive prescription, so neither was he *in titulo* to allege the negative. In *Stewart* v. *Houston*,[2] in an action of reduction of certain titles by a mid-superior on the ground of multiplication of superiors over him, the Court held that the privilege of challenging rights in themselves null could not be lost by the negative prescription, unless a correlative right had been acquired by some one else by the positive. A decision doubly wrong: for if the rights were intrinsically null, no one could acquire anything by prescriptive possession upon them, and if they were not intrinsically null, the right to challenge them would be lost by the mere failure to exercise it, whether or no a corresponding right had been established in another by prescriptive possession. In *Macdonnell* v. *Duke of Gordon*,[3] the Lord Justice-Clerk Boyle expressed the opinion that the defender could not avail himself of the negative prescription unless his own titles were fortified by the positive. Lord President Hope, indeed, in the same case, and again in *Earl of Dundonald* v. *Dykes*,[4] explained Mr. Erskine's doctrine to mean that the negative prescription cannot be pleaded except by a person who has in him such a title as would be good if the positive prescription had run. But this interpretation is expressly excluded by Mr. Erskine's own words; and it seems better at once to admit that the question whether the plea is validly proponed depends not on the rights which the party pleading it may or may not allege, but upon the question (1) whether the right asserted by the party against whom prescription is pleaded falls within the terms of the statute, and (2) whether he has neglected to prosecute that right for forty years. This view was taken so long ago as the end of last century,[5] and may be held to

[1] 1828, 6 S. 1059.

[2] 1823, 2 S. 263.

[3] 1828, 6 S. 600.

[4] 1836, 14 S. 737.

[5] *Rocheid* v. *Kinloch*, 1800, M. *voce* Prescr. App. 1. Nos. 4 and 7; 1805, 5 Pat. App. 35.

represent the undoubted state of the law,[1] subject only to the proviso that one who pleads the negative prescription must have a legal interest in his own person to enable him to do so.[2] Whatever doubt may exist as to whether a party may plead the negative prescription who is not in a position to plead the positive, 'there can be no question that, where he can avail 'himself of the positive, he can plead the negative,' p. Lord Deas, in *Officers of Ordnance* v. *Magistrates of Edinburgh*,[3] where the Crown, being in a position to plead the positive prescription, was held entitled to plead the negative against a decree of reduction of a charter which had never been acted upon, and which formed an important step in the competing progress of titles to the subjects in question.

Rights of action distinct from rights of property.

Rights of property, then, which are not struck at by the general clause of the Act, must be carefully distinguished from rights of action which are, though Lord President Hope professed his inability to draw the distinction.[4] In *Paul* v. *Reid*[5] an action was brought for reduction of declarator of expiry of the legal, and was met with the plea of negative prescription, which was sustained. It was not that the pursuer was debarred *lapsu temporis* from producing, and competing on, his own heritable title. But in a competition of titles he was confronted with a title of the defender's which he *must* reduce in order to prevail. And in the attempt to reduce it, not on the ground of forgery or any *ex facie* invalidity, but upon some extrinsic quality or question he necessarily failed, not having pursued such action within forty years. In *Macdonell* v. *Duke of Gordon*,[4] where the defender pleaded that the pursuer had lost his title to a right of patronage by negative prescription, Lord Corehouse said: 'If there be a principle well settled in

[1] *Paterson* v. *Wilson*, 1859, 21 D. 322; *Chisholm* v. *Chisholm Batten*, 1864, 3 M. 202 (p. Lord Deas, 225).

[2] *Wauchope* v. *York Bgs. Coy.*, 1781, M. 10, 706; 2 Pat. App. 595.

[3] 1859, 22 D. 219 (p. Lord Deas, 236); 1862, 24 D. H. L. 3.

[4] *Macdonell* v. *Gordon*, 1828, 6 S. 600.

[5] 8 Feby. 1814, F. C.

'the law of Scotland, it is this—that the right of ownership 'in a feudal subject, being complete, cannot suffer the negative 'prescription. . . . There is not the trace of an authority or 'decision that a title to land, radically defective in its con-'stitution, and followed by a possession short of forty years, 'is preferable to a title radically good, but upon which no 'possession has followed.' Lord Mackenzie also pointed out that if the negative prescription could extinguish a right of property, there would be no room for the positive, because in every case the negative prescription must be the stronger of the two. In *Earl of Dundonald* v. *Dykes*,[1] the pursuer's right to reduce a decree-arbitral more than forty years' old was held to be cut off by the negative prescription. In *Cubbison* v. *Hyslop*,[2] a party had been infeft in certain lands in 1803 under a charter of sale granted in 1791, following on a decree of sale in 1787. The ranking and sale had been preceded in 1774 by an adjudication, in which there was no *ex facie* nullity. In 1832 a reduction was raised of the decrees of adjudication and sale and of the title made up under them. It was held that the defender (whose title was not fortified by the positive prescription) was entitled to plead the negative prescription as cutting off the right of reduction, and that the right of challenge was so extinguished. Lord Corehouse again enunciated the principle with great force and lucidity, though he held that in this case the pursuer was not barred by the negative prescription from challenging the defender's right, and that the competing titles must be tried on their own merits. 'I may possess,' he said, 'for a hundred years, but if [I am] not infeft, any 'competitor who has neglected his right for that time may 'competently establish it, if his right is better than mine. . . . 'What is the result? Not that the person who brings the 'challenge shall succeed because the negative prescription can-'not be objected, but that both parties must produce their 'respective progresses and compete upon them. . . . The nega-

[1] 1836, 14 S. 737.

[2] 1837, 16 S. 112.

'tive prescription is not of use in being objected directly against 'a heritable right of ownership, but in trying the validity of 'the competing progresses, and in getting rid of various ob- 'jections which might otherwise have been competent. For 'example, A disposes to B, B to C, and so on. One of these 'dispositions is objected to on the ground of forgery, or because 'it was impetrated by force or fraud. Now all these objections 'are cut off by the negative prescription. For although ex- 'ceptions founded on *ex facie* nullities, for example, that the 'deed is not subscribed, or that it is tested by only one 'witness, and the like, are not barred, yet all objections not 'appearing *ex facie* on the deed are effectually cut off by the 'negative prescription.' Lastly, in *Paterson* v. *Wilson*[1] an action concluded for (1) production of an alleged disposition of, and (2) declarator of right of property in, a park. The disposition had never been feudalised, and it was alleged to have been returned, in security for a loan, sixty-four years ago to the defender or his father, who, during the interval, had been in undisturbed possession of the park, which was included in their titles from 1767, though infeftment had not been taken till 1832. Here, no doubt, there was a declarator of property, and to that alone, based upon titles in the pursuer, the defender's plea of negative prescription would have been no answer. But the pursuer's success in the declarator, nay his continued insistence in that conclusion, depended upon his prevailing in the conclusion for the production of the alleged disposition, which was the sole ground of the right of property he claimed. The question, said Lord Deas, whether the right of action as a declarator of property is cut off would only arise if the pursuer could maintain his case without first getting a decerniture for exhibition and production of the disposition he founds upon. 'But, admittedly, he has no case without such 'decerniture; and it is for this reason that the whole case 'comes to turn on the primary conclusion. Now against the

[1] 1859, 21 D. 322.

'right of action to recover the deed out of the defender's reposi-
'tories, I have no doubt the negative prescription is pleadable.
'It is the strongest case possible for the application of the
'plea where the pursuer, admitting possession upon an *ex facie*
'good title (though not fortified by the positive prescription)
'for the last sixty or seventy years, simply says—If you
'will admit me to your charter-chest, I shall recover an un-
'feudalised disposition which will upset your title.' The Court, accordingly, unanimously sustained the plea of prescription. It is to be noted that, if Lord Deas's opinion be correct, the right of raising an action of adjudication and implement upon a general disposition—which used to be the method of obtaining a proper feudal title upon such a disposition—is lost if such action be not pursued within forty years.[1] It is conceived that the right to expede and record notarial instrument upon such a conveyance—which by the Acts 21 and 22 Vic. c. 76, § 12, and 23 and 24 Vic. c. 143, § 8, is substituted for the older form of making up a feudal title—is also extinguished by failure to exercise it for forty years from the date of the conveyance. Where two titles to an estate, one limited and the other unlimited, with different destinations, exist in the same person, one who has a *jus crediti* under the limited destination loses his right to compel the heir in possession to make up his title under the limited destination by mere failure to put that right in force for forty years. But if the right to succeed under the unlimited title and the right to succeed under the limited title come to exist in different persons before the lapse of forty years, the claim of property put forward by the heir under the entail cannot be defeated by the negative prescription alone, and can only be met successfully by the plea of the positive prescription based upon the possession for forty years of the heir under the fee-simple title, or of his ancestors upon that title. These propositions will be found illustrated in any case

[1] *Chisholm* v. *Chisholm-Batten*, 1864, 3 M. 202.

where prescription has been found to 'work off the fetters,' as it is called, of a limited title. (See *supra*, p. 47.)

Res merae facultatis.

The rule that a right of property cannot be lost *non utendo* may be regarded as a branch of the more general principle that *res merae facultatis* are exempt from the operation of the negative prescription. A man may do what he pleases with his own property, and his neglect to turn it to any particular purpose in no wise implies a dereliction of it, far less that establishment of a right to it in another, which Mr. Erskine postulates as the indispensable correlative of the effectual extinction of a right of property by disuse. Mines and minerals, for example, constitute in themselves a *plenum dominium*, and failure to work them for forty years on the part of one who has an express title to them will not forfeit his right.[1] Not so, however, if the minerals are claimed in virtue of an infeftment in the lands not specially conveying them.[2] The right of a titular to parsonage tithes is a right to a separate estate. The obligation to pay parsonage tithes has been imposed by public law on all lands not expressly exempted from the burden; consequently the fact that the titular has failed to enforce that obligation will not extinguish his right. The right to vicarage tithes, on the other hand, being established by mere usage, may be lost by disuse of payment. A superior does not lose his right to demand feu-duties or feudal casualties by omitting to exact them for forty years, nor can a vassal claim immunity from them on the score of that omission, for the right is inherent in, and essential to, the *dominium directum*.[3] So the fact that lands had lain in non-entry for more than forty years did not exclude the process of non-entry.[4] The right of a vassal to enter with an over-superior is *res merae facultatis*, and failure to exercise it does not imply its abandon-

[1] *Crawfurd* v. *Bethune*, 1821, 1 S. 110.

[2] *Forbes* v. *Livingstone*, 1827, 6 S. 167; 1 W. & S. 657.

[3] *Duke of Buccleuch* v. *Officers of State*, 1768, M. 10, 711.

[4] *Governors of Cauvin's Hospital* v. *Falconer*, 1863, 1 M. 1164.

ment, or indicate any choice to hold base.[1] The *jus sanguinis* never prescribes. The person who is entitled to take up the heritable succession of a person deceased may do so at any time provided he is not anticipated by somebody else acquiring a right in the meantime, and having that right fortified by prescription. (See *infra*, p. 189.) A right of redemption is *res merae facultatis*,[2] and so is the right to surrender teinds.[3] The right of a seller of part of a heritable estate to be relieved of a proportion of the public burdens corresponding to the part sold cannot be lost by prescription, whether there is a stipulation for relief in the conveyance or not.[4] The right of the proprietor of a ground storey of a tenement (reserved in his own titles and in those to the other storeys) to open and use a door in the common stair, was held to be *res merae facultatis*, and therefore not subject to prescription.[5]

Servitudes not *res merae facultatis*.

The exercise of servitudes, on the other hand, is by no means *res merae facultatis*, for a servitude is not a right of property. One whose tenement is subjected to a servitude in favour of another tenement may prescribe immunity from that servitude by the omission of the dominant proprietor for forty years to use the servitude, or by himself doing that from which he is bound by the servitude to refrain, provided that for the prescriptive period the dominant proprietor fails to assert his right to the abstinence in question. It makes no difference though the servitude be engrossed in the titles of both tenements.[6] A public right of way is no more *res merae facultatis* than a right to a servitude, but may be lost by disuse during the whole of the prescriptive period,[7] even if its exist-

[1] *Cheyne* v. *Smith*, 1832, 10 S. 622.

[2] *Reid's Trustees* v. *Duchess of Sutherland*, 1881, 8 R. 509.

[3] *Chisholm-Batten* v. *Cameron*, 1873, 11 M. 292; *Earl of Minto* v. *Pennell*, 1873, 1 R. 156.

[4] *Mill* v. *Skene*, 1794, M. 10, 715.

[5] *Gellatly* v. *Arrol*, 1863, 1 M. 592. See also *Smith, etc.*, v. *Stewart*, 1884, 11 R. 921, where the distinction drawn between a servitude and a *res m. f.* is extremely subtle.

[6] *Graham* v. *Douglas*, 1735, M. 10, 745.

[7] *M'Farlane* v. *Morrison*, 1865, 4 M. 257; *Magistrates of Elgin* v. *Robertson*, 1862, 24 D. 301.

ence prior to the beginning of that period be fully established. Certain public or quasi-public rights—none of them rights of property—have also been held liable to the negative prescription, though expressly granted in a charter; *e.g.* the right of a burgh of barony to have its customs, tolls, etc. (which were granted to the baron under a royal charter), applied to its common good, though the charter contained an express provision that the money was to be so applied[1]; and the rights of a royal burgh when the charter of erection has been altogether neglected, and the burgh has accepted a charter from a neighbouring proprietor.[2] A right to levy dues under a charter of free harbour is also probably liable to the negative prescription.[3] Where the magistrates of a town had a right to levy tolls on a certain river within definite limits, it was held that a particular ford within those limits had prescribed an immunity from tolls because for more than forty years it had been employed by the public without any toll being exacted.[4] In like manner, where a town had a grant of harbour, the use of a place within the limits of that grant *as a separate harbour* for forty years, without any dues being exacted, was held to extinguish the right of levying dues at that particular spot.[5] In both these cases, the toleration by the grantee of open and habitual defiance of his right was held to infer a dereliction of that right. They are, therefore, easily distinguishable from the case of the *Magistrates of Edinburgh* v. *Scott*,[6] where it was held that a grant conferred by royal charter on the city of Edinburgh to levy harbour dues within certain limits entitled the magistrates to levy dues at all places within these limits as well as at the two recognised ports within them; and that a proprietor on the shore was not entitled to

[1] *Kelso* v. *Duke of Roxburghe*, 1755, M 10, 737; rev. 1757, H. L.

[2] *Magistrates of Hamilton* v. *Duke of Hamilton*, 1726, M. 10, 777.

[3] *Magistrates of Renfrew* v. *Hoby*, 1854, 16 D. 348.

[4] *Magistrates of Linlithgow* v. *Mitchell*, 1822, 1 S. 476. See *Miller* v. *Storie*, 1757, M. 10, 738.

[5] *Dundee Harbour Trustees* v. *Dougall*, 1848, 11 D. 6.

[6] 1836, 14 S. 922.

load or unload at any spot within the limits, and so infringe the grant, merely because dues had not been levied at that particular place. There was no averment of constant and universal use to land in defiance of the charter, and such constant and universal use must have been proved in order to imply dereliction of the right.

Rights affected by the statutes.

Without pretending to exhaust the various obligations and rights of actions which fall within the scope of the statutes, we may now proceed to note some of the cases in which the application of negative prescription has been discussed and considered by the Court. A claim by a legatee against an executor is cut off by the negative prescription,[1] but not if, within forty years, the executor has acknowledged that the legacy has not been paid.[2] A trust fund had been bequeathed to the provost and bailies of a town for certain purposes, and had been taken possession of and administered for two hundred years by the town-council. An action calling on the council to denude in favour of the provost and bailies was held cut off by the negative prescription.[3] Where beneficiaries raised an action to have it declared that a certain transaction entered into by the trustees more than forty years before was *ultra vires* of the trustees and could not be binding on the trust estate, the plea of negative prescription proponed by the trustees was sustained;[4] and in general beneficiaries under a trust-deed lose their right under it against the trustees *non utendo*.[5] A bond obliging the granter to consign the price of an estate purchased at a judicial sale, if not enforced by the creditors within the prescriptive period prescribes, and so does the obligation to consign.[6] A right to have an obligation made a heritable burden is lost by not being enforced.[7] In *Baillie*

[1] *Jamieson* v. *Clark*, 1872, 10 M. 399.

[2] *Briggs* v. *Swan's Executors*, 1854, 16 D. 385.

[3] *Baird* v. *Magistrates of Dundee*, 1862, 24 D. 447; 1863, 1 M. H. L. 6.

[4] *Barns* v. *Barns' Trustees*, 1857, 19 D. 626.

[5] *Pollock* v. *Porterfield*, 1778, M. 10, 702; 1779, 2 Pat. App. 495.

[6] *M'Innes* v. *Brander*, 1844, 6 D. 512.

[7] *Pearson* v. *Malachi*, 1892, 20 R. 167.

v. *Cochrane*,[1] the question was raised whether a valid obligation to entail is struck at by the negative prescription; and it seems to have been answered in the affirmative in *Earl of Eglinton* v. *Earl of Eglinton*,[2] where substitutes under an entail which trustees were directed, but failed, to make, were held to have lost their right to call upon the trustees to execute the entail, by neglecting to enforce it for forty years. The old case of the *Duke of Buccleuch* v. *Officers of State*[3] is an excellent illustration of the negative prescription, and the reports, which are extremely confused, and which led even Mr. Napier astray, are worth unravelling. The facts are these. The Earl of Buccleuch held a barony upon a base infeftment from Sir John Ker (who held ward of the Crown), and got a perpetual discharge of the feu-duty. His heiress, on marrying the Duke of Monmouth, granted procuratory for resigning these lands, and took a charter of them as holding feu of the Crown, 'aliisque jus habentibus,' in 1664, for payment of a specified feu-duty, which, however, was not exacted till 1760, when the barons ordered that the Duke of Buccleuch should be charged with the arrears of the feu-duty for forty years back, and in all time coming. The Duke brought an action to have it declared that his barony was held ward of the Crown in the original author, Sir John Ker, and therefore was now held blench of the Crown. He averred that the Countess had taken a feu-holding of the Crown by mistake. The Crown pleaded positive prescription upon the superiority title, and added the plea that the Duke was barred by the negative prescription, since he or his ancestor might have brought an action within the prescriptive period to correct the alleged error in the investiture. After many vicissitudes, the Lords found the feu-duty payable to the Crown, and the case was settled upon this rubric. 'The right of superiority of lands

Duke of Buccleuch v. Officers of State.

[1] 1855, 17 D. 659; 1857, 19 D. H. L. 14.

[2] 1861, 23 D. 1369.

[3] 1768, M. 10, 711; 1 Hailes, 237, 303, 333; Napier, p. 559-563.

'held by an erroneous tenure being found to be established 'by prescription in the Crown, the right to the feu-duties 'found to be vested in like manner in the Crown, and the 'vassal accountable for a retrospective period for forty years.' It is difficult to see how the positive prescription comes into the case. Had the right of the Crown to the superiority of the lands been challenged (in the same way that the right of the Crown to teinds may be challenged),[1] by any one offering to compete, the possession of the vassal upon the Crown charter would have been the possession of the Crown and would have sufficed to clothe any title the Crown might produce (supposing such a title to be necessary in the Crown). But a grant by the Crown to a vassal would, whether clothed with possession or not, afford no title to the Crown as against one challenging the Crown's right of superiority, which was not challenged here. Again, if any one had challenged the Duke's right to the lands, the Crown charter (even if the Crown had been *non dominus*) clothed with possession, would have given the Duke a prescriptive title good against the world. But there was no question of that sort here. What the Duke was seeking was, in fact, the alteration or reduction of his charter, not by reason of any intrinsic nullity, but, upon the wholly extrinsic ground that his ancestor had been careless and had made a mistake. It is, therefore, submitted that the decision of the Court amounted to this: (1) that the Duke's right to correct the charter and to make good the alleged mistake—a right which at one time had been indisputably his or his ancestors'—had been lost by not being put in force within forty years from the date at which it emerged; and (2) that a superior's right to exact feu-duties and casualties is not lost *non utendo*. The case upon the whole does not justify Mr. Napier's interpretation of it as illustrating the doctrine that the possession of the vassal is the possession of the superior, any more than it justifies Mr. Bell's inference (which is also

[1] *Cheape* v. *Lord-Advocate*, 1871, 9 M. 377.

the rubric in the dictionary), that an original tenure of lands may be lost by the negative prescription.[1] It merely gives effect to the statutory provision that a right of action must be enforced within forty years or else prescribe. In a feu-contract, a vassal was taken bound to relieve the superior of all public burdens under the qualification that the superior was to pay a fourth thereof. In the feu-charter the qualification was omitted, and the vassal discharged the whole public burdens for two centuries. It was held that the vassal had lost his right to be relieved of one-fourth of the public burdens by failing to enforce it. The charter on which he held his lands was free from any such qualification.[2] On the other hand, where the original investiture of lands contained limitations upon the casualties exigible by the superior, and where the investiture was renewed by precept of *clare constat* in which these limitations were not repeated, it was held that the right to enforce these limitations was not lost by forty years possession on the precept, for that a precept of *clare constat* is not such a new title as will import, when fortified by possession, disuse extinctive of the original privilege, but is simply the acknowledgment of a person as heir under the original investiture which still remains qualified by the limitation, and can never be released from the limitation by the negative prescription.[3]

Bonds of annuity, annual pensions, and the like obligations, which cannot be discharged at once, do not prescribe through failure to enforce them for forty years. Their arrears, however, like arrears of feu-duty, are extinguished by the lapse of forty years, and each year's payment runs a separate course of prescription.[4] But a bond bearing interest may be extinguished by no demand being made for payment of interest for forty years, for the bond is a single obligation, and the interest an accessory

[1] Prin., § 2017.

[2] *Leslie* v. *Earl of Moray*, 1827, 5 S. 284.

[3] *Stewart*, 3 June 1813, F. C.

[4] *Lockhart* v. *Gordon*, 1730, M. 10, 736; *Burt* v. *Burt*, 1858, 20 D. 402.

or quality thereof. A defence or exception competent to a defender is not lost *non utendo* if it be merely an answer to the pursuer's claim, for it cannot be used until the claim be raised which it is to meet, *e.g.* a receipt, the essence of which is to afford a perpetual protection. *Temporalia ad agendum sunt perpetua ad exeipiendum.*[1] But where the exception is founded on some claim of the defender against the pursuer, which is itself productive of an action, *e.g.* compensation, it may be lost by prescription, because it ought to have been insisted in within forty years.[2]

Negative prescription as affecting teinds.

Where a heritor obtained decree of sale of teinds, with power to intromit with his own teinds until he should get a heritable right, and where he continued in possession for forty years, it was held in an action at the instance of the titular for bygone teind duties, that the decree of sale was not affected by the negative prescription, his right to require the titular to denude at any term being *res merae facultatis*. The fact of his intromissions with the teinds excluding the supposition of dereliction was also an important element in the decision.[3] Whether a decree of valuation of teinds by the sub-commissioners is liable to prescription is a point that has occasioned some doubt. On the one hand it is argued that such a decree is a right which is lost by not being pursued for forty years,[4] on the other that it implies the creation of no new right, but is merely evidence of matter of fact, and furnishes the heritors with a perpetual exception to meet any claim in excess of their valued teinds.[5] In *Maxwell*, the Court seems to have held that there was sufficient evidence of dereliction, and in *Drymen* that there was not. seems also to have been given in the latter case to a plea of *non valens agere*, based upon the fact that the

[1] *Sinclair* v. *Murray*, 1712, M. 10, 735; *Campbell* v. *Halket*, 1747, M. 11, 634; 1 Pat. App. 427.

[2] *Carmichael* v. *Carmichael*, 1719, M. 2, 677.

[3] *Lady Cardross* v. *Graham*, 1710, M. 10, 57.

[4] *Maxwell* v. *University of Glasgow*, 1764, M. 10, 692.

[5] *Heritors of Drymen* v. *Officers of State*, 1757, M. 10, 675; *Thomson* v. *Officers of State*, 1763, M. 10, 687.

decrees had been carried off to London during the usurpation, and had only been recently discovered, and upon the consequent principle that the heritors could not have abandoned a right of which they knew nothing. There is now no doubt that if there are contrary actings for the prescriptive period, sub-valuations are lost, and cease to have any effect. Not so, however, with the decrees of the High Court, or with decrees of approbation of sub-valuations pronounced by the High Court. These are not lost by dereliction, and qualify all subsequent decrees of locality.[1]

Rights of heritors *inter se.*

The application of prescription to the rights of heritors *inter se* was settled in the case of the *Earl of Fife* v. *Duff*,[2] where it was held that though prescription does not begin to run against a claim for repayment by an overpaying heritor in a locality against an underpaying heritor till a final decree of locality is pronounced, it does operate where the overpayments by the heritor are caused by his own act in failing to produce a decree of valuation. From Lord Adam's judgment we extract the following synopsis of the previous decisions, and the principles deducible therefrom.

1. Heritors are at common law precisely in the same position as debtors, bound jointly and severally. The title of an overpaying heritor to relief from an underpaying heritor depends upon the fact that he has paid to their common creditor the whole, or part, of the debt for which they are both liable *in solidum*. The liability to relieve, and the consequent ground of action, arises when each overpayment is made, and therefore the long prescription begins to run when each payment is made.

2. Upon this rule, the case of *Weatherstone* v. *Marquis of Tweeddale* [3] has grafted this exception, that where payments of stipend are made under an *interim* decree of locality, there is

[1] *Colquhoun* v. *Fogo*, 1873, 11 M. 919, Lord-President Inglis, 928; *Earl of Minto* v. *Pennell*, 1873, 1 R. 156.

[2] 1887, 15 R. 238.

[3] 1833, 12 S. 1.

an implied judicial contract among all the parties, that when the legal obligations of the heritors have been determined by final decreet, their several interests shall be adjusted from the commencement of the process or processes, according to the true state of their rights and obligations, and that the claims of relief thus arising cannot be affected by the length of time during which the settlement of the locality may have been delayed. The dependence of the process keeps alive until final decree that right to a future adjustment of such payments as shall be made under *interim* decree, which is implied in the very nature of their *concursus* in that process. No right of action emerges, and therefore prescription cannot begin to run, till final decree has been pronounced.

3. But where an under-paying heritor who has been a party in a process of locality sells his lands and leaves the parish more than forty years before an action of repetition is brought against him by an over-paying heritor, it will be held that the right of relief is cut off by the negative prescription on the ground that the under-paying heritor, by selling his lands and leaving the parish, becomes a stranger to the proceedings, ceases to have power to intervene in them to any purpose, and therefore cannot be affected by them.[1]

Reversions would seem of their own nature to be *res merae facultatis*. They are therefore expressly named in the Act 1617, c. 12, as being, nevertheless, subject to the operation of the negative prescription, and only those incorporate with the infeftment, or registrated in the Clerk of Register's books, are excluded from its influence. For a reversion to satisfy the condition of being 'incorporate with the infeftment,' it need not be inserted *verbatim* in the sasine. But there must be such a clear and explicit expression of the nature of the right as is capable of putting people on their guard.[2] A general

Reversions.

[1] *Sinclair* v. *Campbell's Trustees*, 1877, 4 R. 1126 rev. 1878, 5 R. H. L. 119.

[2] *Geddes* v. *Miller*, 28 May 1819, F. C.; *Nicolson* v. *Keith*, 1810. Hume, 470.

reference to reversions engrossed in previous titles will not suffice.[1] Nor will the privilege of exemption be extended to any other class of rights than reversions, *e.g.* a liferent reserved *in gremio* of a party's titles.[2] It is a nice point how long reversions limited in point of time continue to qualify the titles *in gremio* of which they are engrossed. In the case of a conventional right of reversion limited to seven years and *in gremio* of the grant, it was contended for the pursuer that an incorporate reversion could not be lost *non utendo*, that the defender's title bore *ex facie* to be only a title in security, and that, though the right of reversion was temporary, that limitation went for nothing until declarator had passed upon it. This amounted to the contention that a temporary right of reversion should have all the effect of a perpetual one, where there was no declarator of expiry; and the Court held, though by the narrowest majority, that the defender's title was now irredeemable, the reverser not having offered to redeem since the term, more than forty years ago, when the right of redemption was by paction to become void.[3]

Registered reversions are by the very terms of the statute entitled to exception from prescription equally with reversions incorporated with the title; and so it was held in *Elliot* v. *Maxwell*.[4] But in *Scott* v. *Bruce-Stewart*[5] the Court emphatically overturned that decision, holding that in a competition with the feudal clause of the Act the general clause must yield; and that no reversion, even when registered, which has not been acted on within forty years of its date, could qualify an *ex facie* absolute title to lands clothed with forty years' possession. Such a reversion is extinguished by failure to pursue upon it just as much as a registered bond.

Terminus The statute provides that prescription is to run from the

[1] *Munro* v. *Munro*, 19 May 1812, F. C.

[2] *Stuart* v. *Cuming*, 1711, M. 10, 722.

[3] *Pollock* v. *Storrie*, 1738, M. 7216.

[4] 1727, M. 10, 977; Ersk., *Inst.*, 3. 7. 10.

[5] 1779, M. 13, 519; 3 Ross L. C. 464.

date of the bond containing the obligation. But this has long been interpreted to mean, from the date of payment or fulfilment of the obligation.[1] The general principle, of course, is that until a right of action emerges, prescription cannot begin to run, for there is no right to prescribe. Thus, in an action of damages against a law agent, who had blundered in an inhibition, it was held that prescription did not run upon the right of action from the date at which the error was committed, but from that at which it was discovered, and at which the inhibition was set aside.[2] Prescription runs *de die in diem*, and the prescriptive period is not altered as regards the negative prescription by 37 and 38 Vict. c. 94, § 34.[3] *a quo.*

The statute takes special notice of actions arising upon warrandice to the effect, not of excepting them from prescription, but of providing that prescription shall run upon them from the date of distress only, and not from the date of the bond or infeftment which contains the warrandice. This clause may seem unnecessary, in as much as a clause of warrandice can, as a general rule, only supply a ground of action when there has been eviction. But warrandice may take effect before eviction, if the cause inferring eviction be evident and clear, especially if the same be the deed of the party warrander;[4] and it is conceived that in such a case the right of action against the granter of the warrandice will begin to suffer the course of prescription not from the time when the *calendia agendi* comes into existence, but, from the date of actual distress. Warrandice.

With regard to warrandice, an interesting question has arisen, whether it is altogether lost *non utendo* for forty years after partial eviction, or whether it is only lost as regards the particular lands, or the particular right, evicted. Where in a conveyance of lands to the pursuer's author, in 1715, there Effect of partial eviction.

[1] *Butter* v. *Gray*, 1665, M. 11, 183; *Lutefoot* v. *Prestoun*, 1780, M. 11, 187.

[2] *Cooke* v. *Falconer's Representatives*, 1850, 13 D. 157.

[3] *Brodie* v. *Mann*, 1884, 11 R. 925.

[4] *Smith* v. *Ross*, 1672, M. 16, 596.

had been a clause of warrandice against future augmentations of stipend, and where successive augmentations, in 1719, 1793, 1807, and 1823 respectively, had been granted to the minister, without any action on the part of the disponee of the lands against the granter of the warrandice, it was held that the whole obligation to relieve against augmentation did not prescribe because there had been distress to a certain extent; yet that distress was made perfect even by an *interim* locality, and that the claim of relief to the extent of the right then evicted began from that moment to prescribe. 'We think that what prescribes 'under the statute of 1617 is the right of action for any distress 'or loss actually incurred by eviction, and that the prescription 'cannot extend farther than the eviction.'[1] In this case, on a remit back from the House of Lords, the Court held that a general clause of assignation of writs and evidents was sufficient to connect the purchaser with the warrandice against future augmentations in his author's titles. This judgment the House of Lords reversed,[2] and in so doing apparently laid down the proposition that such a warrandice is altogether distinct from warrandice of a title to lands, and is a collateral and independent contract. If this distinction be correct, it seems natural to inquire with Lord Moncreiff whether such a warrandice, being merely a collateral obligation, really falls under the statutory exception as to the *terminus a quo*, and whether prescription must not be taken to run from the date of the obligation.[3] The difficulty was got over by Lord Justice-Clerk Hope, who pointed out that even if such clauses of warrandice are to be treated like ordinary bonds, prescription does not begin to run till they are exigible, *i.e.* from the date of eviction. The other problem suggested by Lord Moncreiff—whether a *valentia agendi* would not be raised by the right to cause such

[1] *Horne* v. *Marquis of Breadalbane's Trustees*, 1835, 13 S. 296. See *Breadalbane's Trustees* v. *Sinclair*, 1838, 16 S. 815; *Lennox* v. *Hamilton*, 1843, 5 D. 1357.

[2] 1 Bell's App. 1, at pp. 36 and 58.

[3] *Sinclair* v. *Marquis of Breadalbane*, 1844, 6 D. 378.

independent obligation to enter the feudal titles *in terminis* and whether the obligation may not be 'worked off' like the fetters of an entail—was not then, and has not since been, solved by the Court.

CHAPTER X

OF EXCEPTIONS AND REPLIES TO THE STATUTE

Non valens agere.

1. *Non valens agere.*—An adversity of right would naturally seem to be an essential condition of there being *termini habiles* for prescription. *Contra non valentem agere non currit praescriptio* is a maxim which appears to be involved in the very notion of prescription, and we have noted its application in cases of prescription on double title. The *valentia agendi* signified is a legal and not a merely physical ability, and an *impedimentum juris* is required to constitute the corresponding inability. In spite, however, of the general principle that unless there be a *valentia agendi* there can be no prescription, the Court has repeatedly expressed the opinion that *non valens agere* is not a valid reply to a plea of prescription under the feudal clause of the Act 1617, c. 12 (except in cases of double title). Lord-President Dundas, with Lord Kames and Lord Pitfour, declared, in *Campbell* v. *Wilson*,[1] that the plea of *non valens agere* belonged to the negative, and not to the positive, prescription; the doctrine was even more explicitly laid down in *Millers* v. *Dickson*;[2] and was emphatically affirmed in *M'Neill* v. *Macneal*,[3] where the facts were as follows. In the marriage-contract of A, lands were destined to the heirs-male of the marriage, whom failing, to the nearest lawful heirs-male of A. A was succeeded by his son B, and B by his son C, who made up a title as nearest lawful heir-male of his father, but not as heir-male of provision, and was infeft on a precept from Chancery in

[1] 1765, 5 Br. Supp. 926.
[2] 1766, M. 10, 937.
[3] 1858, 20 D. 735.

1788. He executed an entail of the estates in favour of D, an illegitimate son, who was infeft therein in 1818, and possessed till 1854, when his right was challenged by X, the heir-male under the marriage-contract, who sought to reduce the retour of 1788. D pleaded prescription upon his father's infeftment in 1788 (which would, of course, preclude inquiry into the retour), clothed with possession by his father C and by himself conjoined. X in reply pleaded *non valens agere* during the years of C's possession. 'The principle of the law of Scotland,' it was urged, 'was now clearly, that when a party against 'whom prescription is pleaded could have derived no benefit 'from an interruption of prescription, there are no *termini* '*habiles* for prescription.' The Court sustained D's title, clothed with forty years' possession, as a habile ground of prescription, and expressly repelled the plea of *non valens agere*. 'I cannot 'hold that because the possession must be uninterrupted, it 'follows by necessary inference that it was meant that pre-'scription should not run, whenever it happened that there was 'no party who could take any substantial benefit by the inter-'ruption' (p. Lord Wood). Those who are startled by the view that there can be prescription where there is no *valentia agendi* may be content with the less sweeping proposition that, though there must always be an abstract *valentia agendi*, there need by no means be an actual person in the enjoyment of that *valentia*, and may believe that *M'Neill* might have been more easily disposed of on the analogy of the *Elsieshiells* case;[1] for the pursuer's contention was neither more nor less than this, that D's father, C, who was both heir-male of provision and heir-male of line, and who could not be compelled to serve as heir-male of provision, was debarred, because he had made up a title as heir-male of line, from altering the destination (which would otherwise have continued to be the *lex feudi*)—an act which he would admittedly have been entitled to perform if he had made up titles under the

[1] *Edgar* v. *Maxwell*, 1736, M. 3089. *Supra*, p. 52.

marriage-contract, which, according to the pursuer's contention, prohibited him from altering, since he had neglected it.

That the plea of *non valens agere* is unreservedly a competent answer to that of the negative prescription has never been questioned. It is to be noted, however, that the plea is not statutory, but purely equitable. If, then, the legal inability to pursue be due to the conduct of the very party pleading it, *e.g.* his failure to produce a document of whose existence he was well aware, the plea of *non valens agere* will be repelled.[1]

The cases which deal with the answer, *non valens agere vi majore*, are somewhat conflicting. In *Lauderdale* v. *Tweeddale*,[2] the Duke of Lauderdale was held entitled to deduct from the prescriptive period the years during which he was under forfeiture by the usurpers. The same result was arrived at in *Whitefoord* v. *Kilmarnock*,[3] though in a previous case Colonel Whitefoord had not been permitted to deduct the years during which he had been absent on service with the King's army.[4] Yet, in *Campbell* v. *Wilson*,[5] it was laid down by the Court of Session, and affirmed by the House of Lords, that the plea of forfeiture by an established government is no reply to that of prescription. So we arrive at the singular conclusion that forfeiture by a foreign prince, or a band of usurpers, constitutes an inability to take action, while forfeiture by a lawful government does not. The whole subject was thoroughly discussed in *Graham* v. *Watt*,[6] where the plea of *non valens agere* was proponed by one who had been pressed into the navy, and owing to continued service for five-and-twenty years, had been ignorant of, and unable to assert, his rights. The Court decided that 'there must be a legal incapacity to sue, not 'merely a difficulty to do so, nor even a real ignorance of '[one's] rights' (p. Lord Medwyn).

Mental disability.

2. *Mental Disability.*—There is considerable doubt as to

[1] *Earl of Fife* v. *Duff*, 1887, 15 R. 238.
[2] 1678, M. 11, 193.
[3] 1681, M. 11, 198.
[4] 1678, M. 11, 196.
[5] 1765, 5 Br. Supp. 915, 926.
[6] 1843, 5 D. 1368.

whether mental disability is an answer to the plea of prescription. It does not fall within *non valentia*, as Mr. Bell holds,[1] if, as we have just seen, that is to be truly interpreted as being not so much any personal disability as the absence of any legal right upon which a claim may be based; nor can it safely be reckoned as analogous to infancy. Sir George Mackenzie was of opinion that it must be taken to have been deliberately omitted from the Act 1617, c. 12, and therefore cannot be a valid reply to the statutory plea. The point has never been decided.

Minority.

3. *Minority.*—After the feudal and general clauses, the Act 1617, c. 12, goes on to provide for the exclusion of the years of minority and less-age from the reckoning of the prescriptive period. Minority acts merely as a suspension of the course of prescription, and the term of possession that precedes it is not deprived of its prescriptive quality. The Court soon established the applicability of this exception to the feudal as well as the general clause. But its operation is kept within certain bounds. Thus, the plea of minority is a purely personal privilege in favour of individuals, and is therefore not available to hospitals for the education of children,[2] or to a body of creditors of whom one is a minor.[3] The party who pleads it must have in his person the specific and immediate right (though not necessarily a formal title) against which prescription is urged. Thus prescription upon the general clause of a bond, conveyed to trustees for behoof of minors, and not pursued for forty years, was held not to be suspended by the minority of the beneficiaries, because prescription was running against the trustees, and not against the minors, so long as no division was made among them, and so long as the trustees continued alive.[4] With regard to entails, the minority of the prescribing heir in possession is not to be deducted to his

[1] Prin., § 627.

[2] *Heriot's Hospital* v. *Hepburn*, 1695, M. 11, 149.

[3] *Allan* v. *Brander*, 1839, 1 D. 678; 1842, 1 Bell's App. 167.

[4] *Maclellan* v. *Menzies*, 1756, M. 11, 160. But see *Baillie* v. *Menzies*, 1756, 5 Br. Sup. 847.

disadvantage, and the years of minority of substitutes can be deducted only in favour of those who, while minors, had vested in them an immediate claim to the right in question.[1] But one substitute heir of entail cannot deduct the years of minority of prior substitutes,[2] nor indeed his own, unless the succession has opened to him as a minor.[3] For the right to suspend prescription on the plea of minority is confined to those who have a present, and not a mere contingent, right to claim possession;[4] and only the minority of a party claiming directly as *verus dominus* can be deducted.[5] There was much confusion on this head in the *Bargany* case.[6] There, an heir substitute of entail brought a declarator of irritancy against the heir in possession, together with a declarator of her own consequent right to the property. The heir in possession met her with a plea in terms of the feudal section of the Act; he produced a valid, unlimited title, clothed with his possession for more than forty years. The substitute maintained that the years of her minority ought to be deducted from that term; but the Court held that they were not to be deducted. Solicitor-General Blair, however, threw out the suggestion, which was at once taken up, that the substitute was really *vera domina*, for that if she established the irritancy she would be entitled to enter upon *immediate* possession of the lands. Misled by this notion, a majority of the Court came round to be of opinion that the pursuer was entitled to deduct the period of her minority. That is to say, it chose to assume (1) that there had been an irritancy; and (2) that the pursuer was consequently next heir under the entail; for without these assumptions it could not be maintained for a moment that the pursuer was claiming *quâ vera*

Bargany case.

[1] *Macdougal* v. *Macdougal*, 1739, M. 10, 947.

[2] *Ayton* v. *Monypenny*, 1756, M. 10, 956.

[3] *Maule* v. *Maule*, 1829, 7 S. 527.

[4] *Gordon* v. *Gordon*, 1784, M. 10, 968; *Creditors of Auchindachy* v. *Grant*, 1792, M. 10, 971.

[5] *Buchanan* v. *Boyle*, 1847, 9 D. 686; *Black* v. *Mason*, 1881, 8 R. 497.

[6] *Fullarton* v. *Dalrymple*, 1796, 1 W. & S. App. I., p. 3; 1798, M. 11, 171; 3 Pat. App. 691; 4 Pat. App. 175; 3 Ross L. C. 484; Napier, p. 494, *seq.*

domina. In other words, it was quietly taken for granted that the pursuer was right both in fact and law in the first conclusion of her action, in order that she might have a valid answer to the plea of prescription proponed against her. In vain did Lord-President Campbell and Lord Meadowbank insist on the vital distinction between a direct declarator of property, where the party against whom prescription has been running, and is pleaded, may deduct the years of his own minority, and a declarator of irritancy and contravention of the fetters of an entail, which is founded on a *jus obligationis*, vested equally in all the substitute heirs of entail, and capable of being asserted by any one of them;[1] who, in this respect, form, as it were, a class—though not an actual corporation; who cannot therefore plead the minority of any of their number;[2] and of whom no one is preferable to another; so that an heir of entail, who if his declarator of irritancy succeeds, will become heir in possession, no more pursues such a declarator *quâ verus dominus*, than would the last heir named in the substitution. 'The circumstance of afterwards getting 'possession is merely a consequence of vacating the fee, but 'adds nothing to the right of making it vacant' (p. Lord Glenlee). The House of Lords corrected, indeed, the view of the Court of Session that a near heir of entail is preferable in such a matter to a more remote one, but attempted to substitute for it the doctrine that all heirs of entail are entitled to plead their minority: which would in many cases render the Act 1617, c. 12 useless. No more, however, has been since heard of a principle so completely at variance with the settled law of Scotland; and the ultimate decision in the *Burgony* case was a finding on the merits that the matters in the appellant's summons were not sufficient to sustain the conclusions.

The years of minority also fall to be deducted in cases lying outside the statute, *e.g.* such as involve public right-of-way.

[1] Ersk. 3. 8. 32.

[2] Cf. *Allan* v. *Brander*, 1839, 1 D. 678; 1842, 1 Bell's App. 167; *supra*, p. 103.

Acts of possession by the public during the minority of a defender in a declarator of right-of-way cannot be founded on to his prejudice.[1] But when usage is founded on as interpreting a grant, what occurred during the minority of the granter's representative is not to be thrown out of account.[2] The phraseology of the Act seems to leave no room for doubt that the time during which a child is *in utero* is to be deducted from the prescriptive period as well as the twenty-one years subsequent to its birth.[3]

37 and 38 Vict. c. 94, § 34.

The Act 37 and 38 Vic. c. 94, § 34, provides that where thirty years' possession has followed upon an *ex facie* valid irredeemable title, no deduction or allowance is to be made on account of the years of minority or less-age of those against whom the prescription is objected, or of any period during which any person against whom prescription is objected was under legal disability.

Ex facie nullity.

4. *Ex facie nullity.*—A deed which is *ex facie* null, *e.g.* not duly tested, can never be fortified by the positive, or saved from challenge by the negative, prescription. An action to reduce a deed on the ground of an erasure was held not to be barred by the lapse of the prescriptive period; for the error was *in substantialibus*, and the deed was consequently alleged to be *ex facie* void.[4] In *Kinloch* v. *Bell*[5] the Court held that objections to a decree of locality founded on incompetency or nullity appearing *ex facie* of the deed were not affected by the negative prescription; and remitted to the Lord Ordinary to decide (1) whether certain objections were *ex facie* of the decree, and (2) whether, if so, they amounted to nullities. (See *supra* p. 17).

Falsehood.

5. *Falsehood.*—Falsehood, *i.e.* forgery,[6] is a valid answer to

[1] *Craufurd* v. *Menzies*, 1849, 11 D. 1127.

[2] *Baird* v. *Fortune*, 1861, 23 D. 1080.

[3] *Campbell* v. *Wilson*, 1765, 5 Br. Sup. 915, at p. 917.

[4] *Shepherd* v. *Grant's Trustees*, 1844, 6 D. 464; 6 Bell's App. 153: 3 Ross L. C. 336.

[5] 1867, 5 M. 360. See *Speir* v. *Lord Willoughby d'Eresby*, 1891, 18 R. 407.

[6] *Duke of Buccleuch* v. *Cunynghame*, 1826, 5 S. 53.

the plea of prescription (in spite of a remark of Lord Corehouse's in *Cubbison* v. *Hyslop*)[1] first, because of the general maxim, *numquam praescribitur in falso*; and secondly, because of the feudal clause of the statute which expressly excepts 'falsehood' from the grounds on which a right of property may not be impugned by one producing a competing title after the lapse of the prescriptive period.[2] (See *supra*, p. 18).

Interruption

6. *Interruption.*—Interruption of the course of prescription entirely cancels that portion of the prescriptive period which has already elapsed. A new term of forty years begins to run from the date of the interruption, and this new term must be completed before prescription can take place. Interruption is competent at the last moment of the last day of the forty years, but if postponed to so late a date, it must be explicit and direct, and must unequivocally imply a challenge of the right which possession has all but fortified, or an assertion of the right which failure to assert is on the point of extinguishing.

of positive prescription;

The positive prescription may be interrupted judicially or extra-judicially. Judicial interruption is effected by citation, which, unless renewed, is extinguished as an interruption after seven years;[3] or by an action brought into Court, which endures as an interruption for forty years. A vassal obtained decree of declarator of tinsel of superiority against his superior, who held of the Prince, and obtained an unqualified charter from the Prince as immediate vassal, on which he was infeft, and possessed for more than forty years. It was held that the vassal had not prescribed a right as against his former superior so as to exclude the latter from challenging his infeftment, because his possession had been interrupted by a declarator of non-entry brought by that superior within the forty years and still depending.[4]

Extra-judicial interruption is effected by demanding and

[1] 1837, 16 S. 112.
[2] Bankton, II. 166.
[3] Act 1669, c. 10.
[4] *Wallace* v. *Earl of Eglintoun*, 1830, 8 S. 1018.

obtaining, or by effectually assuming possession; or by notarial protest, upon which an instrument must be extended and recorded in the General Register of Sasines,[1] to make it available to or against singular successors. When a public right-of-way has once been established, it requires evidence of interruption and acquiescence therein for forty years to extinguish it.[2]

of negative prescription.

In like manner, interruption of the course of the negative prescription may be either judicial or extra-judicial.

Judicial interruption may be (1) by citation, (2) by action, or (3) by diligence.

Judicial.

(1) When interruption is by citation, the citation, as we have seen, must be renewed every seven years on pain of prescribing.[3] A citation, however, followed by such judicial acts as suffice to constitute a process, or depending action, *e.g.* appearance of parties, affords a plea of interruption for forty years, and requires no statutory renewal.[4]

(2) To effect interruption by action, the summons must be called in Court; though if execution be prior to the expiry of the forty years, the calling need not be; the pursuit must have a direct reference to the debt in question and to the party debtor; and must be founded upon an absolute right to the debt. Interruption by process, however, no matter by whom it has been used, 'may be pleaded by any creditor where the 'bringing of such suit has been intended by law to promote 'the common interest of all the creditors.'[5] Hence claims entered formally, and fulfilling all statutory requirements, in processes of ranking and sale, multiplepoinding, and sequestration, are a good interruption. But an action of debt in general is no interruption of the prescription of a particular debt; nor can an action resulting in a decree assoilzieing the de-

[1] 31 and 32 Vict. c. 64, § 15.

[2] *Magistrates of Elgin* v. *Robertson*, 1862, 24 D. 301, at p. 304; *Rodgers* v. *Harvie*, 1827, 5 S. 917; 1828, 3 W. and S. 251.

[3] Act 1669, c. 10.

[4] *Wilson* v. *Innes*, 1705, M. 10, 974.

[5] Ersk., *Inst.* 3. 7. 41.

fender be pleaded against him as an interruption of prescription.[1]

(3) Diligence done upon a debt, effectually to interrupt prescription, must be such as affords the debtor a distinct notification that the creditor means to prosecute his claim. A general charge, or letters of horning without a charge, or, generally, any informal diligence, will not afford an interruption.[2] Even where a threatened charge was suspended by the debtor, and therefore prevented from following upon a horning, there was held to have been no valid interruption.[3] An assignation or transference of his debt by a creditor is not an interruption, even though it be duly intimated to the debtor.

Extra-judicial.

The terms of the Act have not been held to exclude the possibility of effectual interruption by some act of the debtor's implying an acknowledgment of his obligation. An admission by a trustee that a legacy is owing will prevent the legatee's claim to it from suffering prescription.[4] A submission of the particular debt will interrupt,[5] but not a general submission of all debts.[6] A decree in terms of the libel, followed by a bond of corroboration and a letter asking for indulgence on a demand for payment is a good interruption;[7] but mere communings on the subject of a claim, and craving time to investigate it, are not.[8] Payments of interest will preserve a bond from prescription, but they cannot be proved by parole.[9]

Hay v. *King's Advocate.*

In both species of interruption the important points are that (1) the action shall be raised against, or the acknowledgment granted by, the proper debtor: (2) with regard to the par-

[1] *Montgomery* v. *Fowles*, 1795, Bell's Fo. Ca. 203.

[2] *Johnston* v. *Lord Belhaven*, 1672, M. 11, 237; *Earl of Hopetoun* v. *York Bgs. Coy.*, 1784, M. 11, 285.

[3] *Wright* v. *Wright*, 1717, M. 11, 268.

[4] *Briggs* v. *Swan's Executors*, 1854, 16 D. 385.

[5] *Vans* v. *Murray*, 14 June 1816, F. C.

[6] *Garden* v. *Rigg*, 1743, M. 11, 274.

[7] *Aitken* v. *Malcolm*, 1766, Hailes, 148.

[8] *Pitmedden* v. *Monro*, 1705, M. 11, 261.

[9] *Kermack* v. *Kermack*, 1874, 2 R. 156.

ticular obligation, and (3) shall proceed upon, or refer to, a proper right or claim to that obligation. The case of *Hay* v. *King's Advocate*[1] affords a good illustration of these indispensable conditions. The Crown, in right of the forfeited estate of Lovat, stood in the place of the proper debtor. The pursuer was a creditor against the estate by virtue of a bond and subsequent adjudication to which she had acquired a right. Against her claim the Crown pleaded prescription, the answer to which was interruption, effected by the pursuer's author having formerly produced his grounds of debt in an action of reduction brought against him, not by the proper debtor but by another adjudger. The pursuer also relied upon an obligation to enter into a submission of all the debts in question, undertaken by a son of one of these co-creditors with another co-creditor, as a valid interruption. Against this it was argued that the persons concerned in the submission were not the persons properly liable in payment of the debt, and that as an action brought against either of them would not have sufficed to interrupt prescription, far less could any private unfinished transaction with them have that effect. This contention was upheld by the House of Lords, which, reversing the judgment of the Court of Session, dismissed the claim against which prescription was pleaded. In another case between the same parties, an important variation in the *species facti* led to a different result.[2] In 1690 Lord Lovat had come under a bond for 1600 merks, which debt, and various others, were accumulated under one adjudication at the instance of a trustee for the whole creditors. In 1703 the trustee obtained decree of constitution *cognitionis causâ*, to make all these debts effectual against Lord Lovat's estate: upon which there followed in 1704 decree of adjudication against the whole Lovat estate for all these several debts, with interest, accumulated into one large sum. To the bond for 1600 merks the pursuer had acquired right

[1] 1756, M 11, 276; rev. 1758, H. L. 272; Napier, p. 665 *seq.*

[2] 2 Pat., App. 272; Napier, p. 668 *seq.*

from her father, and the debt was assigned to her in 1737. Under this assignation, the pursuer entered her claim for the debt in 1749 to the Court of Session, after the forfeiture of the Lovat estates. More than forty years had elapsed between the decree of adjudication in 1704 and the presentation of the claim in 1749: and the Crown pleaded prescription. In reply interruption was proponed. (1) It was alleged that Lord Lovat had in 1738 entered into a submission with a creditor of several of the debts comprehended in the adjudication. A decree-arbitral had followed, under which he was paid off. This transaction had no direct relation to the particular debt on which pursuer founded, but it was contended that it amounted to an express written recognition of the whole debts under the adjudication, and therefore interrupted the course of prescription upon pursuer's debt. (2) After 1715, the life interest in the Lovat estate fell into the hands of the Government Commissioners, and in 1718 the pursuer's trustee entered a claim before that Court upon the bond and adjudication. This claim was discovered entered in the Register of Claims; and it was contended that the claim itself was sufficient interruption, as it amounted to the raising of an action before the only court competent in the circumstances. (3) The minority of several of the pursuer's children was also pleaded. The House of Lords, following the Court of Session, held that the pursuer's claim was not cut off by the negative prescription. The precise grounds of the decision cannot certainly be determined. The plea of minority was manifestly unsound. The first ground for the plea of interruption was no doubt a transaction in which the proper debtor was concerned; though it is submitted that it cannot be regarded as an acknowledgment of the separate and particular debt in question. But the second ground—the creditor's pursuit before the commissioners in 1718—supplies *per se* ample reason for sustaining the plea of interruption.

While in any act sufficient to interrupt prescription, it is

Diligence by, or acknowledgment to, putative creditor.

absolutely necessary that the proper debtor should be involved, it has been held, and is apparently the law, that where a putative creditor has done what, if done by the real creditor, would have sufficed to interrupt, the real creditor if he pursues his claim afterwards is entitled to the benefit of that interruption.[1] Nay more, the acknowledgment of a debt by a debtor, by means of a formal transaction with a mere putative creditor, whose title is thereafter rejected, will probably suffice to found a plea of interruption for the true creditor, in a question of prescription with that debtor.[2] But an action raised by a creditor on a wrong title, even though he has a good title in his person, will not form a sufficient ground for him to plead interruption of the course of prescription.[3] The case of *Robertson* v. *Robertson*,[4] indeed, seems at first sight to conflict with *Campbell* [1] and *Morrison*.[2] There a party pursued payment to himself of the whole sum provided in a marriage-contract to heirs, male or female. He was held entitled to only one-third of the amount, as there were two other children of the marriage. Ten years after, the pursuer, by assignation granted by his sister, acquired right to another third of the provision: and he enrolled the cause to obtain decree for that amount also. But more than forty years had elapsed between the date when the sister might have claimed her provision and the date of her assignation. Prescription was accordingly pleaded against the pursuer: and if that plea was valid, it is obvious that the sister had, at the date of the assignation, no claim to assign. The pursuer argued that prescription was interrupted as to his sister's claim by *his* having raised an action prior to the expiry of the forty years. The Court sustained the plea of prescription. Yet, asks Mr. Napier, if it be law that a creditor can plead as an interruption the pursuit of one who is an entire stranger to the right, why might

[1] *Campbell* v. *Earl of Breadalbane*, 1746, M. 6554.

[2] *Morrison* v. *Yorstoun*, 1849, Napier, p. 676 *seq.*

[3] *Blair* v. *Sutherland*, 1735, M. 11, 270.

[4] 1776, M., *voce* Prescr. App. 2.

not the brother's action save the sister's claim from prescription? The answer probably is that an action where the defenders are assoilzied is no interruption; and the pursuer's action having failed, except as regards his share of the property, it could not be held to be an interruption as regards any other claim.

Partial Interruption;

It remains to consider whether partial interruption affects the course of prescription on the whole right or no. A debt may undoubtedly be so divided by assignation, that interruption as to one part will not apply to the rest.[1] On the other hand, in the case of a right held *pro indiviso* by several creditors, interruption effected by one will benefit all.[2] Diligence used against one of two or more co-principal debtors preserves the debt itself, and so interrupts prescription against all the co-obligants,[3] and diligence used against a cautioner interrupts prescription as to the principal debtor.[4]

in annual rents

An annual-rent was granted out of two tenements in Leith over the whole subjects, and the burden was constituted by separate sasines. The two tenements were afterwards transmitted to different proprietors, A and B, by singular titles. The annual-renter only pursued his right against A, which it was held perfectly competent for him to do, but reserving A's right to relief from B. When A sought to obtain relief from B, B pleaded the statute 1617, he having bruiked his tenement for more than forty years before the pursuit, free from such annual-rent. The Court held that an annual-rent was an indivisible obligation, the whole of which was preserved from prescription by the assertion of any part of the right; while such assertion also operated as an interruption to the possession necessary to found a plea upon the feudal clause.[5] But it is otherwise with adjudications. An adjudication being a right of property under reversion, partial possession

and adjudications.

[1] *Cuming* v. *York Buildings Company*, 1790, M. 11, 170.

[2] Napier, p. 698.

[3] *Earl of Marchmont* v. *Home*, 1714, M. 11, 154; *Nicolson* v. *Lord Philorth*, 1667, M. 11, 233.

[4] Ersk. 3. 7. 46.

[5] *Lord Balmerino* v. *Hamilton*, 1671, M. 11, 234.

cannot apply to protect the whole right.[1] The distinction between the two classes of obligation seems to be this. The drawing a portion only of the annual-rent, or drawing the whole from a portion of the lands, is the assertion of a right to draw the annual-rent. The right to draw being asserted, it becomes *res merae facultatis* how or in what quantity it is to be drawn. But adjudication is a transference which gives the right to possess. Possession of one tenement can never be construed to be the assertion of a right to possess another : and to take possession of a portion only of the lands transferred is practically to derelinquish the right as regards the rest of the land. It is quite possible, however, for the whole *debt* to be saved from prescription by partial payment, though the security be destroyed *pro tanto* by merely partial possession.

[1] *Robertson* v. *Robertson*, 1770, M. 10, 694.

PART II

THE SHORT PRESCRIPTIONS

CHAPTER XI

OF THE TRIENNIAL PRESCRIPTION

§ 1. IN CAUSES OF SPUILZIES AND EJECTIONS.

(STAIR, 1. 9. 16; 2. 12. 30.)
(ERSKINE, *Inst.* 3. 7. 16.)

THE Act 1579, c. 81, runs as follows :— Act 1579, c. 81.

'Item, it is statute and ordained by Our Soveraine Lord, with 'advise of his three Estaites in Parliament, that all actiones of 'spuilzies, ejectiones, and utheris of that nature, be persewed befoir 'the ordinar judge within three zeires after the committing theirof, 'utherwise the perseweris alledged hurt never to be heard there-'after. Providing that this act extend not to minours, bot to 'persew within three zeiris after their perfite age.'

Spuilzie is the taking away of moveables without consent of the owner, or order of law. Ejection is the casting out violently from lands the then possessor, and unwarrantably entering into the same. Intrusion, which is understood to fall within the statute by force of the clause, 'others of that nature,' is the entering into possession of lands, being for the time void, without consent of the parties interested, or order of law. The statute has from the first been interpreted to mean, not that actions for reparation of these delicts are incompetent unless

pursued within three years, nor that there has been any dereliction of his claim on the part of the person injured, but that the privilege enjoyed by the pursuer of such actions—viz. that of proving the extent of his injury by his own oath *in litem*—is cut off, if the action be not brought within the specified limit of time.[1] It is expressly provided that, where the party alleging wrong is in minority, the course of prescription is not to begin till he is of full age.

§ 2. IN CAUSES OF REMOVING.

(STAIR, 2. 9. 43; 2. 12. 30).

(ERSKINE, *Inst.* 3. 7. 18 & 36).

Act 1579, c. 82.

The Act 1579, c. 82, runs as follows :—

'Item, it is statute and ordained be our Soveraine Lord, with 'advise of his three Estaites in Parliament, that all actiones of 'remooving be persewed within three zeires after the warning, with 'certification and they failzie, the warneris sall never be heard 'thereafter to persew the samin upon that warning.'

The three years run from the term to which the warning is made.[2] If the action be not pursued within three years from that term, the pursuer is presumed to pass from his warning, and cannot pursue his action of removing, except upon a new warning.

§ 3. IN CERTAIN CAUSES OF DEBT.

(STAIR, 2. 12. 30.) (ERSK. *Inst.* 3. 7. 17, 18.)

(BELL, *Prin.* §§ 628-633.) (BELL, *Comm.* 7th ed. i. pp. 348-351.)

(DICKSON ON EVIDENCE, §§ 484-528 [476-520].)

Act 1579, c. 83.

By far the most important and far-reaching of the short prescriptions is that established by the Act 1579, c. 83.

[1] *Constable of Dundee* v. *Laird of Strathmartin*, 1587, M. 11, 067; *Baillie* v. *Young*, 1835, 13 S. 472.

[2] *Borthwick* v. *Scott*, 1629, M. 11, 076.

'Item, it is statute and ordained be Our Soveraine Lord, with 'advise of his three Estaites in Parliament, that all actiones of 'debt, for house-mailles, mennis ordinars, servands fees, merchants 'comptes, and uther the like debts, that are not founded upon 'written obligationes, be persewed within three zeires, utherwise 'the creditour sall have na action, except he outher preife, be writ, 'or be aith of his partie.'

The terms of the statute are brief, and apparently simple enough. But their interpretation has given rise to much controversy, and many of the cases seem to conflict, though the law may now be considered as tolerably well fixed.

§ 4. OPERATION AND EFFECT OF THE STATUTE 1579, c. 83.

Operation and effect of the statute.

The statute does not entirely cut off the claims with which it deals. 'It is confined barely to the mean of proof, and does 'not import a total loss of the claim.' Hence a debt, though not pursued within the three years, affords good ground for an arrestment *jurisdictionis fundandae causâ*[1]; though a prescribed account will not entitle a creditor to vote in the election of a trustee on the debtor's sequestrated estate.[2] The object of all enactments of this sort (cf. the quinquennial prescription of moveables, *infra*, p. 158, and the sexennial prescription of bills, *infra*, p. 161) is to protect against the demand for payment of old debts, and 'to throw the *onus* of establishing the same on 'the pursuer by a certain specified and very safe mode of proof.'[3] If the action be brought within the three years, the pursuer may establish his claim by proof *pro ut de jure*; if he pursue after the expiry of the three years, he is tied down to a particular mode of proof. Hence there can, properly speaking, be no 'interruption' of prescription; for the effect of a so-called interruption is not to start the short prescription upon a fresh course, but to make the claim last for forty years.[4] 'The true

[1] *Shaw* v. *Dow and Dobie*, 1869, 7 M. 449.

[2] *Wink* v. *Mortimer*, 1849, 11 D. 995.

[3] *Campbell* v. *Grierson*, 1848, 10 D. 361, p. Lord Justice-Clerk Hope.

[4] *Ferrier* v. *Earl of Errol*, 9 July 1811, F. C. p. Lord Meadowbank.

'sense of the statute is, that unless the action in which you 'seek to prevail [rather, the action against which the statute 'is pleaded] is brought within three years, you have no action 'at all [save by the limited mode of proof], and any other action 'just goes for nothing;'[1] *i.e.* in respect of barring the plea of prescription. 'I can find no authority in the statute for hold-'ing that there can be any such defence as interruption.' Where the plea is urged that prescription is barred by a previous action having been raised, it can make no difference whether such an action, brought within the three years and dismissed, was really competent or not, because it is not the action against which the statute is pleaded, or in Lord Pitmilly's phrase, the action 'in which the party is to recover.' 'So long 'as the action has to be brought to recover, the action for debt 'has not been pursued, and therefore the statute is pleadable 'and applies.'[2] But this rigid interpretation of the Act has not been generally acted upon, and it may be taken that pursuit within the three years *other* than that against which the statute is pleaded will bar the plea.

What is pursuit?

The question, what constitues pursuit in the sense of the statute was very fully discussed in the case of *Eddie* v. *Monkland Railways Company*.[3] A sued a Railway Company in 1851 on an account alleged to have been incurred in 1842. The Company pleaded the triennial prescription. A replied that in 1843 the Railway Company had sued him for various sums, to account of which they said they had received the sum of the account now sued for; that he had lodged defences containing a reservation of his claim on this account; and that judgment had been given against the Company. It was held that the proceedings in the former action did not amount to 'pursuit' on A's part, so as to obviate the Company's plea of prescription. 'While it has not been held essential,' said Lord

[1] *M'Laren* v. *Buik*, 1829, 7 S. 483 (p. Lord Glenlee).

[2] *Cochran* v. *Prentice*, 1841, 4 D. 76, Lord Justice-Clerk Hope.

[3] 1855, 17 D. 1041.

Wood,[1] 'to exclude prescription having effect that there shall 'be a direct action instituted at the instance of the creditor 'in the debt, and while, on the contrary, it has been held that 'without such direct action there may, on a reasonable and 'sound construction of the Act, be a pursuit within the three 'years—as, for instance, by the claim being made and insisted 'in in a process of multiplepoinding or of ranking and sale, or 'in a submission which the parties have entered into for the 'settlement of their claims, embracing the one in question, 'which forms a contract between them, and to which the law 'gives its sanction and authority—still there is no case in 'which it has been found that there has been a compliance 'with the requisites of the statute, except where the claim has 'been made in a competent judicial or quasi-judicial proceed-'ing in which it could be given effect to, and in which the party 'asked that effect should be given to it. In that sense and to 'that extent it is true that a suit in the name of the creditor 'is not necessary. Without it he is truly *in petitorio*. But it 'must come up to that. Mere notice of a demand in a judicial 'proceeding is not sufficient, for the statute does not rest upon 'any principle of abandonment of the claim, as the longer pre-'scriptions do, but upon a presumption of payment which is 'not removed by demand only. . . . If in an action of debt 'against a party, he within the three years makes a counter-'claim upon a debt due to him, and insists that it shall 'receive effect in compensation or credit against the debt sued 'for, I think there would be that which in conformity to the 'recognised principle of construction of the word "pursued," as 'used in the Act, would be a pursuit. The judgment in the 'case of *Dunn* v. *Lamb*[2] certainly determines nothing which is 'in the slightest degree opposed to what I have stated to be 'necessary as an answer to the plea of prescription. . . . I 'am of opinion that the debt in question was not made the 'subject of pursuit within three years. . . . The pursuer did

[1] Pp. 1046, 1047.

[2] 1854, 16 D. 944. See *infra*, p. 121.

'not insist in his debt as a counter-claim, and instead of asking 'that effect should be given to it, he asked that it should be 'reserved to him to sue for it in any other action, so that, 'according to his own view, it never could in that action re- 'ceive effect.' Lord Cowan also defined the principle to be 'that there must be an insisting in judicial measures for the 'constitution of the debt by decree in some action suited by 'its nature and character for discussion of the claim and for 'obtaining such decree, and brought into a Court which can 'competently entertain the one and pronounce the other. 'Judicial measures thus resorted to may, or may not, result in 'effective decerniture, so as to lead to recovery of the debt. 'That is not essential. The fact of such measures having been 'resorted to by the creditor in pursuit of his debt within the 'three years will satisfy the statute.'[1]

Broad interpretation of the statute.

These judgments plainly countenance a much broader interpretation of the statute than *Cochran* v. *Prentice*[2] would seem to sanction. At the same time they supply a satisfactory test for determining whether or no there has been such pursuit as will exclude the plea of prescription, and a test which reconciles all the cases on the point. Thus the plea was held to have been barred by the judicial production of the account in question in defence as a counter-claim.[3] Again, where a debtor died insolvent leaving minor children to whom a factor *loco tutoris* was appointed, the factor attended a meeting of creditors, at which were present certain creditors whose debts were prescribed. It was agreed that all the creditors should assign their debts to a Trustee, in order to get a general decree of constitution against the debtor's representatives. In a process of ranking and sale, it was found that the debts prescribed before the meeting remained prescribed, notwithstanding the decree of constitution, but that those on which the three years expired between the meeting and the granting of the decree

[1] P 1048.

[2] 1841, 4 D. 76.

[3] *Sloan* v. *Birtwhistle*, 1827, 5 S. 692.

were preserved from prescription. 'The act of the representa-'tives, through their factor, acknowledging the debt is equiva-'lent to a decree of constitution,' p. Lord Balgray.[1] One who had entered into a reference of a disputed claim within the three years was held to be barred *personali exceptione* from pleading the triennial prescription in an action raised after the three years, and rendered necessary by the death of the referee before giving a decision.[2] Nay, where the pursuer's failure to sue timeously is due to the conduct of the defender, the defender may not plead the statute.[3]

On the other hand, a mere citation will not exclude the plea of prescription,[4] nor will an action raised within the three years and afterwards abandoned.[5] The production of a claim for furnishings, accompanied with an oath of verity in a process of cognition and sale at the instance of tutors, was held not to constitute pursuit. The proceedings were not of the nature of an action of ranking and sale, or of multiplepoinding, where a discussion of the claims takes place, and where decree may follow in favour of the creditor. 'There was no procedure by 'which the creditors could have enforced their claim or 'obtained a decree.'[6]

Procedure after the three years.

The statute, then, provides what, in the event of there being no pursuit within three years, must be the course of procedure. The only resource left to the pursuer is to prove (1) the constitution, and (2) the resting-owing of the debt he sues for,[7] in the way prescribed by the statute, *i.e.* by the writ or oath of 'his 'party.'[8] Grave exception must be taken to the opinion expressed by Baron Hume in his note to *Shepherd* v. *Meldrum*,[9]

[1] *Stuart* v. *Douglas*, 1823, 2 S. 200.

[2] *Dunn* v. *Lamb*, 1854, 16 D. 944.

[3] *Caledonian Railway Company* v. *Chisholm*, 1886, 13 R. 773. Cf. *Earl of Fife* v. *Duff*, 1887, 15 R. 238, *supra* p. 102.

[4] *Campbell* v. *Macneill*, 1799, M. 11, 120.

[5] *Gobbi* v. *Lazzaroni*, 1859, 21 D. 801.

[6] *Ferrier* v. *Earl of Erroll*, 9 July 1811, F. C. (p. Lord Robertson).

[7] *Robertson* v. *Royal Association of Contributors to the National Monument of Scotland*, 1840, 2 D. 1343.

[8] *Campbell* v. *Stein*, 23 Nov. 1813, F. C., 6 Dow, 116.

[9] 1812, Hume, p. 394.

and we may venture to deny that in any case where the statute is pleaded it can lie with the defender to establish by evidence on his part, in due course of law, his defence against the pursuer's claim. Nor is it easy to reconcile with the statute the decision in *Brown* v. *Paterson*,[1] to the effect that because the defender's oath was 'not decisive either way,' the Sheriff should proceed and determine the case by any other competent mode of proof. *Alcock* v. *Easson*[2] has determined once for all that there is no need for the defender who pleads prescription to aver payment. The denial of the debt is contained in the statutory defence, and is the presumption on which the statute is founded. (See *infra*, p. 152.)

Leslie v. *Mollison.*

Considerable confusion has not unfrequently arisen in cases complicated by the fact that the pursuer's 'party' is not the original debtor but his heir or representative. In 1802 Thomas Leslie sued Thomas Mollison for payment of an account due to the late William Leslie, pursuer's father, who had been employed by the late John Mollison, defender's father, in a process in which John Mollison was defender. Before the end of that process John Mollison had ceased to employ William Leslie, and in 1789 he died. The defender had been sisted in the process, but denied having employed William Leslie as his agent. The pursuer did not raise an action for payment of his father's account till twelve years from its close. The defender pleaded prescription, and, that plea being sustained and reference made to his oath, he averred ignorance of the constitution of the debt, and his belief that his father had settled it, while he admitted that he himself had not made payment of the sum claimed. The defender contended that his oath did not import resting-owing, inasmuch as it did not show that his father, the original contractor of the debt, had not paid it. The pursuer, on the other hand, laid stress on the fact that the account was still current at the date of the defender's father's

[1] 1809, Hume, p. 469.

[2] 1842, 5 D. 356.

death, and argued that prescription had not then begun to operate; that the course of employment had been continued by the defender; that prescription did not begin to run till the close of the account, which was in the defender's lifetime; and that the defender had admitted non-payment. In giving judgment for the pursuer the Court seems to have gone entirely upon the ground of the continuity of the account (though it does not sufficiently appear how that continuity was established in the face of the defender's contention that he had employed a different agent); and Lord President Blair distinctly laid down that the presumption established by the Act 1579, c. 83 is, that accounts have been paid, not during their currency, but, after their close.[1] Lord Justice-Clerk Hope, indeed, in reviewing this case in *Cullen* v. *Smeal*,[2] asserts that the account was closed in the defender's father's lifetime, and that the Court, in giving judgment upon the assumption that the fact was so, must needs have based its interpretation of the oath on reference upon the belief that the Act establishes a presumption of payment after the lapse, and not during the course, of the three years. But while it may be readily admitted that the consideration of the presumptions established by the statue has too often distracted attention from the plain meaning of its provisions, the session papers, in conjunction with the report, leave no room for doubt that *Leslie* v. *Mollison* goes no farther than to affirm the proposition that prescription operates solely on a closed account, and that the oath of party to the effect that it has not been paid since the date of the last article establishes resting-owing. This view was followed in subsequent cases;[3] and no more was implied in *Elder* v. *Hamilton*,[4] where the account libelled on was held not to have been closed

[1] *Leslie* v. *Mollison*, 15 Nov. 1808, F. C.

[2] 1853, 15 D. 868.

[3] *Stirling* v. *Henderson* (sexennial), 11 March 1817, F. C.; *Ross* v. *Guthrie*, 1839, 2 D. 6; *Darnley* v. *Kirkwood* (sexennial), 1845, 7 D. 595.

[4] 1833, 11 S. 591.

in the lifetime of the defender's ancestor, and her oath was —perhaps questionably—held to establish resting-owing. But Lord Gillies, in his judgment, gave some countenance to a contention that made its appearance in *Leslie* v. *Mollison*— though it would seem not to have been insisted on—viz., that if an account be closed during the lifetime of the defender's ancestor, but within three years of his death, the plea of prescription is not applicable, and the defender's oath negative of payment by himself necessarily instructs resting-owing. 'The first question,' said Lord Gillies, 'is, supposing 'action to have been raised against the late Mr. Hamilton 'before the close of his life, was the account then current, 'or, could prescription have been pleaded then? *If not so*, '*it cannot be pleaded now*, for the possibility of payment sub-'sequent to his death is directly excluded by the oath.' Lord Gillies here appears to divide accounts into accounts still current, and accounts upon which the term of prescription has run. He omits to notice a third and important class: accounts upon which prescription has begun to operate, but on which it has not yet run for the statutory period. The tendency thus indicated to extend the doctrine of *Leslie* v. *Mollison* to the degree of holding that the statute cannot be successfully pleaded unless the *whole prescriptive period* of three years from the close of the account has run during the ancestor's lifetime, came to a head in *Auld* v. *Aikman*.[1] A debtor died within three years of the last article of an account. His creditor sued his representative no less than four and a half years after the debtor's death, and five years after the close of the account. In the face of these facts, of the statute, and of *Alcock* v. *Easson*,[2] decided a few months before by the Second Division, the First Division, from a mistaken reading of *Leslie* v. *Mollison* and *Elder* v. *Hamilton*, felt compelled to hold that the plea of prescription was inapplicable. To

[1] 1842, 4 D. 1487. [2] 1842, 5 D. 356.

hold this meant to hold not merely that for the Act to become available the *debt* must outlive the allotted period of general proof, but that the debtor must do so too, and that unless the three years had run out in the lifetime of the original debtor, the debt could only be affected by the long negative prescription of forty years.

Cullen v. *Smeal.*

This confusion was happily dispelled by the decision of the whole Court in *Cullen* v. *Smeal*,[1] which expressly reversed *Auld* v. *Aikman*, and which settled the point that there is no warrant for allowing any presumption of payment or non-payment to bear on the construction of the statute or to regulate its operation. 'The statute,' said the Lord Justice-Clerk Hope in a weighty opinion, 'is general and unlimited in 'its terms. It states no exception. It contemplates none.' 'Under the statute neither more nor less is to be proved 'after the three years than during the three years—although 'what the pursuer has during the three years to make out, 'may be much more easily done, and by evidence or presumptions, which after the lapse of three years are excluded by the 'statute.'

'Eliding' prescription.

It may be convenient here to note two distinct senses in which the phrase 'eliding prescription' is used. In the one, the pursuer is said to have elided prescription when, the statute having been found to be applicable, he has proved the constitution and subsistence of the debt in the statutory manner. The phrase is so employed (by Lord Glenlee and Lord Justice-Clerk Boyle) in *Smith* v. *Falconer*[2] and in *Campbell* v. *Arrott*.[3] The other signification of the phrase is that the statute is altogether inapplicable, so that proof may proceed *pro ut de jure*.[4]

Minority.

It is a general rule that minority is never deducted unless

[1] 1853, 15 D. 868.
[2] 1831, 9 S. 474.
[3] 1835, 13 S. 557.
[4] *Mackay* v. *Ure*, 1847, 10 D. 89 (p. Lord Justice-Clerk Hope.)

when particularly excepted.[1] Minority is, therefore, not deducted in the case of the triennial prescription.[2] Nor will absence from the country bar the operation of the statute.[3] The *annus deliberandi* is not to be discounted.[4]

§ 5. DEBTS AFFECTED BY THE STATUTE.

House-maills.

I. '*House-Maills*.'—House-rents on a verbal lease prescribe from year to year.[5] But arrears of rent of a farm,[6] or of a minister's glebe,[7] do not fall within the statute.

'Mennis Ordinars.'

II. '*Mennis Ordinars*,'—by which is understood debts due for the entertainment of persons at board, *e.g.* for board supplied by an innkeeper at a boarding-house, or a tutor at an academy.[8] The most important class of obligations coming under this head is alimentary debts which arise *ex contractu*, and not *ex debito naturae*.[9] Aliment arising from a natural relationship does not suffer this prescription.[10] But a claim against a father for board and lodging supplied to his child, the claim being founded on contract, falls within the scope of the statute,[11] and that though the contract be not express but only implied.[12] Each term's or year's aliment has generally been supposed to be a separate debt running its own course of prescription.[13] But where a claim was made for a debt due for the aliment of an illegitimate child, it was held that the whole

[1] *Campbell* v. *Wilson*, 5 Br. Supp. 915; p. Lord Pitfour; *Baird* v. *Fortune*, 1861, 23 D. 1080.

[2] *Brown* v. *Brodie*, 1709, M. 11, 150.

[3] *M'Ghie* v. *Tinkler*, 1776, M. 11, 112.

[4] *Duke of Argyll* v. *Campbell*, 1736, Elch. Prescr. 10.

[5] *Cumming's Trustees* v. *Simpson*, 1825, 3 S. 377.

[6] *Ross* v. *Fleming*, 1627, M. 12, 735.

[7] *Minister of Kilbucho*, 1628, M. 11, 083.

[8] *Thomson* v. *Lord Duncan*, 1808, Hume 466.

[9] *Hamilton* v. *Lady Ormiston*, 1716, M. 11, 100.

[10] *Davidson* v. *Watson*, 1739, M. 11, 077; *Thomson* v. *Westwood*, 1842, 4 D. 833. See too *Longmuir* v. *Longmuir*, 1893, Scots Law Times, vol. i. p. 143.

[11] *Taylor* v. *Allardyce*, 1858, 20 D. 401.

[12] *Ligertwood* v. *Brown*, 1872, 10 M. 832.

[13] *Frazer* v. *M'Keich*, 1838, 16 S. 1045.

account was to be regarded as continuous, in respect that no agreement to make termly payments was averred.[1]

III. '*Servands' Fees.*'—Each term's wages prescribes separately.[2] A claim made by a woman for remuneration for services rendered to her brother-in-law was held to be equivalent to a claim for wages as a housekeeper, though there had been no agreement as to the remuneration, and to be therefore liable to the triennial prescription.[3] Servants' wages.

IV. '*Merchantes Comptes.*'—This is not held to include all mercantile accounts, or proper accounts current between merchants,[4] but is taken to signify solely shopkeepers' accounts, 'merchant' being equivalent in the Scotch idiom to shopkeeper.[5] The Court will decide under what category, as a matter of fact, a particular account falls. Where a cattle-dealer sued a farmer for the balance of his account, and the account had cross entries wherein the pursuer had entered items of cash paid, the value of dung delivered, and cows sold to him by the farmer, the account was held not to be an account-current between merchants, but to be susceptible of the triennial prescription.[6] 'Merchants' accounts.

V. '*Other the Like Debts.*'—In virtue of this clause the Act has received a very wide interpretation, which has sometimes been complained of, but which, as Lord Mackenzie pointed out,[7] was inevitable. 'Likeness' cannot be interpreted strictly. Other the like debts.

[1] *Bracken* v. *Blasquez*, 1891, 18 R. 819.

[2] *Ross* v. *Master of Saltoun*, 1680, M. 11, 089; *Douglas* v. *Duke of Argyll*, 1736, M. 11, 102; *Alcock* v. *Easson*, 1842, 5 D. 356.

[3] *Smellie* v. *Cochrane*, 1835, 13 S. 544.

[4] *Hamilton* v. *Martin*, 1795, M. 11, 120; *M'Kinlay* v. *M'Kinlay*, 1851, 14 D. 162; *Laing* v. *Anderson*, 1871, 10 M. 74; *M'Kinlay* v. *Wilson*, 1885, 13 R. 210; *Brown* v. *Brown*, 1891, 18 R. 889.

[5] See *Sandys* v. *Lowden*, 1874, 2 R. Just. 7.

[6] *Batchelor's Trustees* v. *Honeyman*, 1892, 19 R. 903.

[7] *Blackadder* v. *Milne*, 1851, 13 D. 820.

Thus, the fee or remuneration due to an engraver for preparing parliamentary plans;[1] to a factor;[2] to a printer;[3] to a surveyor;[4] to a clerk to a submission;[5] to an advocate's clerk;[6] to a surgeon;[7] to a stockbroker for services in promoting a railway;[8] and to law-agents;[9] falls within the Act. The salary of a writer's clerk engaged at so much a week prescribes from year to year, though it be alleged to come in lieu of fees for writings.[10] 'Tradesmen's' accounts, which the Lords would not distinguish from merchants' accounts,[11] are affected by the statute,[12] and so are contracts of *locatio operarum*;[13] though the Act seems to have been found not applicable to a claim for remuneration for superintending the execution of a contract for building houses.[14] There has been doubt whether the furnishing of a single article without a continuous series of furnishing or employment constitutes an obligation to which the statute applies. It was held that it did not, in the case of a claim for the price of 130 sheep all sold at one time,[15] and of a claim for the price of a bullock purchased by one gentleman from another (not by a customer from a tradesman).[16] Lord Chancellor Brougham thought it very doubtful whether a claim for the price of cattle sold under one contract, but delivered at different times, was affected by the triennial prescription.[17] Yet in *Gobbi*

[1] *Johnston* v. *Scott*, 1860, 22 D. 393.
[2] *Grubb* v. *Porteous*, 1835, 13 S. 603.
[3] *Neill* v. *Hopkirk*, 1850, 12 D. 618.
[4] *Stevenson* v. *Kyle*, 1850, 12 D. 673.
[5] *Farquharson* v. *Lord-Advocate*, 1755, M. 11, 108.
[6] *Fortune's Executors* v. *Smith*, 1864, 2 M. 1005.
[7] *Macdowall* v. *Loudon*, 1849, 12 D. 170.
[8] *White* v. *Caledonian Railway Company*, 1868, 6 M. 415.
[9] *Somerville* v. *Executors of Muirhead*, 1675, M. 11, 087; *Leslie* v. *Mollison*, 15th Nov. 1808, F. C.; *Wallace* v. *M'Kissock*, 1829, 7 S. 542.
[10] *Smith* v. *Hamilton*, 1845, 7 D. 499.
[11] *Tweedie* v. *Williamson*, 1694, M. 11, 092.
[12] *Bayn* v. ——, 1692, M. 11, 092.
[13] *Mackay* v. *Carmichael*, 1851, 14 D. 207.
[14] *Donaldson* v. *Ewing*, 10th Dec. 1819, Hume, p. 481.
[15] *Macgregor* v. *Stewart*, 1811, Hume, p. 472.
[16] *Smith* v. *Miller*, 1827, 5 S. 314.
[17] *M'Dougall* v. *Campbell*, 7 W. & S. 19.

v. *Lazzaroni*, it was held by Lord Kinloch in the Outer House, and acquiesced in, that the statute applies to a single purchase of goods,[1] and this decision may be taken to represent the existing state of the law.

But while the statute covers these various species of employment, it does not extend to the contract of *negotiorum gestio*:[2] nor to that of mandate;[3] nor to a mandatory's claim against a mandant for outlay;[4] nor to a soldier's claim for pay against his officer;[5] nor to a parochial schoolmaster's salary;[6] nor to a claim founded upon cash advances made by a tradesman or an agent;[7] nor to accounts between the master and owners of a ship;[8] nor to the claim of that one of several debtors who has paid a merchant's account, against his *correi*;[9] nor to poor's rates.[10] One who has obtained payment of money on behalf of another is not entitled to the benefit of the prescription, though otherwise liable for the debt;[11] nor is the prescription applicable when the case really resolves itself into one of accounting;[12] nor to the claim of a farmer's daughters (who had succeeded to his moveables) against their brother (who had succeeded to the lease of the farm) for the value of seed and labour of downlay of crop.[13] Debts not affected by the statute.

What has been said as to the remuneration of law-agents, and certain other persons falling within the statute, is subject to the important qualification that the employment for which they claim the fees alleged to have suffered prescription must Employment must be in ordinary course.

[1] 1859, 21 D. 801.

[2] *Drummond* v. *Stewart*, 1740, M. 11, 103.

[3] *Berry's Representatives* v. *Wight*, 1822, 1 S. 402.

[4] *Saddler* v. *M'Lean*, 1795, M. 11, 120; *Grant* v. *Fleming*, 1881, 9 R. 257.

[5] *Graham* v. *Earl of Leven*, 1709, M. 11, 093.

[6] *Nicolson* v. *Monro*, 1747, M. 11, 080.

[7] *Ker* v. *Magistrates of Kirkwall*, 1827, 5 S. 742; *Smith* v. *Mitchell's Trustees*, 1829, 7 S. 771; *Maclaren* v. *Bradly*, 1874, 2 R. 185.

[8] *Butchart* v. *Mudie*, 1781, M. 11, 113.

[9] *Bland* v. *Short*, 1825, 3 S. 294.

[10] *Munro* v. *Graham*, 1857, 20 D. 72.

[11] *Freer* v. *Paterson*, 1826, 4 S. 399. See *Waddel* v. *Morton*, 1825, 4 S. 172.

[12] *Brunton* v. *Angus*, 1822, 2 S. 54.

[13] *Mackintosh* v. *Taylor*, 1849, 11 D. 1244.

have taken place in the ordinary course of their business. Otherwise, prescription will not apply. Lord-President Boyle laid great stress on this distinction in *Blackadder* v. *Milne*,[1] where the claim of an engineer for fees as a parliamentary witness was held to be outside the scope of the Act, on the ground that the particular employment was not in the ordinary course of his profession, though a still stronger consideration with the Court was the fact that the contract depended upon a written obligation. On the strength of *Blackadder* it was subsequently decided that the employment of a contractor to give evidence in London before a Parliamentary Committee did not fall within the statute.[2]

An Edinburgh agent claimed remuneration for attending to the interests of certain distillers during the progress of certain bills through Parliament. The defenders pleaded prescription. The question was, in what character the pursuer had acted, and as the majority of the Court held that he had acted *ex mandato* (which in the law of Scotland does not exclude the idea of remuneration), the statute was held not to apply.[3] On the other hand, an account incurred to a London solicitor for opposing a bill in Parliament was held to be liable to the prescription, the employment being in the ordinary course of his business.[4] Sometimes the Court will break up an account, and find that one part falls within the statute and another does not. That portion of a law agent's account which related to business done as a law agent was held to suffer prescription, but not the articles in the account for money advanced to his client, for travelling expenses incurred on behalf of his client, or for town-clerk's fees.[5] But, as a rule, the Court will take the account into consideration as a whole, and not allow articles to be picked out here and there as susceptible of prescription, or

Account to be taken as a whole.

[1] 1851, 13 D. 820.

[2] *Barr* v. *Edinburgh and Glasgow Railway Company*, 1864, 2 M. 1250.

[3] *Walker* v. *M'Nair*, 1832, 10 S. 672; *Paterson and Aikmans* v. *Walker*, 1812; *Simpson* v. *Walker*, 1813, both noted in 13 D. 825.

[4] *Deans* v. *Steele*, 1853, 16 D. 317. *Moncreiff* v. *Durham*, 1836, 14 S. 830.

the reverse; and in a general accounting the triennial prescription is not pleadable as to particular parts of the accounts on one side. In *Boyes' Trustees* v. *Hamilton*,[1] it was decided that business charges occurring incidentally in an account not falling under the statute are not to be held to have incurred prescription separately; and so where a creditor held an absolute disposition of his debtor's property in security for advances made and to be made, and besides making advances to his debtor had supplied him with furnishings, it was held that the triennial prescription did not apply to his account.[2] In like manner, a contractor who had done certain pieces of work for road trustees, some on estimate and some not, was not allowed to pick out from his whole account the pieces of work executed on estimate in order to obviate the application of the statute to them.[3] In *Richardson* v. *Merry*[4] the facts were these:—A Glasgow agent was employed to oppose a bill in Parliament, which he did in conjunction with a London firm of solicitors. It was held that the accounts of both fell within the statute, and that travelling expenses, fees to witnesses, counsel, etc., were not to be excluded from its operation. The distinction was clearly drawn between two sorts of cash disbursements made by agents in the course of their services, and two points, said Lord Curriehill, are settled: 'In the 'first place, that to ordinary disbursements which fall within 'the usual province of a law agent to make, the statute applies; 'in the second place, that to advances made by the agent in 'any different character, for example, as cashier and factor, 'though these charges be included in his accounts, the statute 'is inapplicable.' So while cash advances do not fall within the statute, commission charges for payments made, forming part of a law agent's account, do.[5]

[1] 30th June 1829, F.; 7 S. 815.

[2] *Murray* v. *Wright*, 1870, 8 M. 722.

[3] *Hotson* v. *Threshie*, 1833, 11 S. 482.

[4] 1863, 1 M. 940.

[5] *Scott* v. *Gregory's Trustees*, 1832, 10 S. 375.

Must not be founded on written obligation.

An essential feature of all the actions of debt that fall within the statute is that they are not founded upon 'written obligations.' In *Blackadder* v. *Milne*,[1] as we have seen, the decision proceeded at least as much upon the fact that the claim was founded upon an obligation in writing as upon a consideration of the nature of the pursuer's employment. But not every writing will withdraw a claim from the operation of the statute. Prescription is excluded only when the writing sued upon contains a distinct obligation by the defender.[2] Thus, where a written offer by a tradesman to execute furnishings was verbally accepted, and acted upon, it was held that his claim was not founded on a written obligation, and that therefore the Act applied,[3] and where the pass-book of the pursuer, the keeper of an eating-house, was produced, bearing to be signed by the debtor, in which, however, the entries had been made after he had signed the pages, the pass-book was held not to constitute a written obligation.[4] But where a sack contractor issued a printed form, containing the conditions of his contract, to his customers, which they signed, this was found to constitute such a written obligation as rendered the statute inapplicable to his claim.[5]

§ 6. THE *TERMINUS A QUO*.

Close of account.

The last act of the current employment is the *terminus a quo* of the prescription. Thereafter the statute operates on the closed account.[6] Thus the date of the completion of the work contracted for, and not the date of a measurer's report as to the extent of the work, is the date at which prescription

[1] 1851, 13 D. 820, *supra*, p. 130.

[2] *N.B. Railway Co.* v. *Smith Sligo*, 1873, 1 R. 309.

[3] *Chalmers* v. *Walker*, 1878, 6 R. 199.

[4] *Campbell* v. *Grant*, 1843, 5 D. 755.

[5] *Chisholm* v. *Robertson*, 1883, 10 R. 760.

[6] *Somerville* v. *Exrs. of Muirhead*, 1675, M. 11, 087; *Leslie* v. *Mollison*, 15 Nov. 1808, F. C.

begins to run.[1] But the account may be re-opened by the addition of a new item within the three years,[2] and even where each year's account was summed up and interest charged upon it, the whole account was held to be continuous.[3] Whether an account be current or not, is a question of fact which the Court will determine according to the circumstances of each case. Thus, where an agent sued his debtor's representative, and in answer to the plea of prescription, averred that he had completed certain transactions only after the debtor's death, and had moreover been employed by the defender as her father's representative, the Court held that the pursuer's account had closed with the defender's father's death, chiefly on the ground of the irregularity with which the pursuer's books had been made up.[4] In *Stewart* v. *Scott*[5] it was held that the account sued upon and alleged to be still current had been made up by contrivance, and brought down to within three years of the raising of the action, by fictitious entries, and that, therefore, the statute was applicable. On the other hand, in *Aytoun* v. *Stoddart*,[6] the last items of an account were found to be a *bonâ fide* charge, and not a mere trick to exclude prescription, inasmuch as they had appeared in an account rendered within three months of its close. Where in an action on a tradesman's account the defender stated that the last two articles were fictitious, and inserted to avoid the operation of prescription, the Court allowed proof before answer as to these items.[7] The items within the three years by which it is sought to exclude prescription must not be on a separate account or on other employment.[8] Where an agent had six different accounts against his employer for different

[1] *M'Kay* v. *Carmichael*, 1851, 14 D. 207.

[2] *Torrance* v. *Bryson*, 1840, 3 D. 186.

[3] *Whyte* v. *Currie*, 1829, 8 S. 154.

[4] *Wilson* v. *Rutherfurd*, 1826, 4 S. 427.

[5] 1844, 6 D. 889.

[6] 1882, 9 R. 631. See *Moffat* v. *Marshall*, 1825, 3 S. 329.

[7] *Ross* v. *Cowie's Executrix*, 1888, 16 R. 224.

[8] *Campbell* v. *Jolly*, 1824, 3 S. 25.

pieces of business, the whole was regarded as one account, representing one course of employment on the part of the client,[1] and so a claim by an Edinburgh agent against a country agent is a continuous account, though the account be divided into branches applicable to different clients.[2] In the same case it was decided that the currency of an agent's account may be preserved by the later items, which may be referred to (even if they are not libelled on) to exclude a plea of prescription, although payment for them may have been recovered from a *correus* of the defender: and in *Wotherspoon* v. *Henderson's Trustees*,[3] where a law-agent sued for payment of two accounts separated by an interval of three years, the pursuer was held entitled, in answer to a plea of prescription, to show that the account was continuous by proving continuity of employment during the intervening period, his summons containing a general reservation of other claims not mentioned in it. But where furnishings had been supplied in 1823, and other furnishings were supplied in 1825 and paid for in 1826, and an action was raised in 1828 for payment of the outstanding account, it was held that prescription ran from the last item in the account before the items of 1825, which latter had been specially paid and no longer remained in the account.[4]

Effect of debtor's death.

The effect of the debtor's death upon the currency of an account has been the subject of some doubt. Mr. Erskine says that 'an account is deemed to be current though part of it was 'furnished to the deceased and the remainder to his heirs, 'because the heir is *eadem persona cum defuncto*; and the 'same doctrine may perhaps hold in executors. But the 'currency of an account between a merchant and a person 'deceased is not preserved by furnishings made by the same 'merchant after the debtor's death for his funeral, if these

[1] *Elder* v. *Hamilton*, 1833, 11 S. 591.

[2] *Fisher* v. *Ure*, 1836, 14 S. 660.

[3] 1868, 6 M. 1052.

[4] *Beck* v. *Learmonth*, 1831, 10 S. 81.

'furnishings were made, not to the executor himself, but to a 'negotiorum gestor for him.'[1] Thus, in *Graham* v. *Stanebyres*,[2] the death of a debtor did not interrupt the continuity of an account when the same merchant had furnished the debtor's funeral to his heir; while in *Ormiston* v. *Hamilton*[3] it was held that an account was not continued by articles advanced to the deceased's widow for his funeral, mournings, etc., because she did not represent the deceased. But Mr. Bell says,[4] 'it is now quite settled that the debtor's death closes an 'account, and that furnishings to the widow or heir begin a 'new one.' This principle was the ground of the decisions in *Kennedy* v. *M'Dougal*,[5] and *Lyon* v. *Mitchell*.[6] Where, however, the last article in an account had been ordered by the debtor, but had not been furnished till after his death, the account was held to have been continued by that article, and the judicial admission of the debtor's representative negative of payment was found to establish resting-owing.[7]

Identity of creditor.

Identity of the creditor throughout is an indispensable element in the continuity of an account against which prescription is pleaded.[8] Every change in a firm of partners will not affect the continuity of its accounts. In *Barker* v. *Kippen*[9] the Court refused to decide whether the continuity of an account is destroyed if part of it be incurred to a firm, and part to a partner continuing the business of the firm, though it was held that the circumstances of the case showed the account to be continuous. But the assumption of a *bonâ fide* partner makes a wholly new *persona*; and the formation of a new firm calls into being a new contract, and different parties to the contract.[8]

[1] Inst., 3. 7. 17.
[2] 1670, M. 11, 086.
[3] 1709, M. 4981.
[4] Comm. i. 349.
[5] 1741, M. 11, 104.
[6] 1819, Hume, 481.
[7] *Broughton* v. *Weston*, 1826, 4 S. 501.
[8] *Wotherspoon* v. *Henderson's Trustees*, 1868, 6 M. 1052.
[9] 1841, 3 D. 965.

§ 7. WRIT OR OATH OF PARTY.

'Party.' The pursuer, as we have seen (*supra* p. 121), must, after the expiry of the three years, prove the constitution and subsistence of the debt sued upon by writ or oath of 'his party.' The term 'party' is to be interpreted strictly, though the letters of a factor acknowledging the existence of a debt were held to be constructively writ of party.[1] In *Bertram* v. *Stewart's Trustees*[2] the oath of the manager of the alleged debtor was held to be inadmissible on the ground that, though the manager had been called in the action, he was not properly a defender and 'party.' It is quite incompetent for a tradesman to prove resting-owing of a prescribed account by the oath of the housekeeper (and near relation) of the party for whom the furnishings had been ordered.[3] It is doubtful whether a prescribed debt may be established against the owners of a ship by the oath of the ship's husband, who can indisputably bind his owners for furnishings to a vessel. But if the ship's husband be himself one of the owners and defenders, his oath is admissible.[4] The oath of a wife, where she is *praeposita*, is equivalent to the oath of her husband, because she is *eadem persona* with him.[5] But Lord Young has expressed the opinion that, while the constitution of a debt incurred by a wife after her marriage may be referred to and proved by her oath, resting-owing must be referred to the oath of her husband.[6] The oath of a partner will bind the company of which he is a partner, provided the Court be satisfied that the constitution of the debt as a company debt has been established. 'One party may bind the 'company for business done in the line of that company

[1] *Smith* v. *Falconer*, 1831, 9 S. 474.

[2] 1874, 2 R. 255.

[3] *Gilmour* v. *Stuart's Representatives*, 1797, M. 12, 042.

[4] *Duncan* v. *Forbes*, 1829, 7 S. 821; 1831, 9 S. 540, p. Lord Gillies.

[5] *Young & Co.* v. *Playfair*, 1802, M. 12, 486.

[6] *Mitchells* v. *Moultrys*, 1882, 10 R. 378.

'without the knowledge of the other partners'; and where a partner on reference to oath deponed that the debt had been contracted by the other partner in the company for his own special business, it was held that this, taken together with his admission of non-payment, must establish the constitution and resting-owing of the debt against the company, unless it could be proved that the pursuers were aware that there had been a private arrangement between him and his partner to prevent his being liable.[1] But where a company has been dissolved, the oath of a partner, who had been sequestrated and discharged, is not admissible to prove a debt against the company,[2] nor will the oath of a partner's representatives be sufficient statutory proof of the constitution and subsistence of the debt of a dissolved company.[3] The oath of one of several joint owners will not bind the rest.[4] The oath of the debtor's representative is, of course, equivalent to the oath of the debtor; but where the heir of a deceased debtor brought a process of ranking and sale against his father's estate, and claims were lodged by creditors, all of which were prescribed at the time of lodging, and some at the death of the debtor, a reference to the oath of the debtor's heir was held incompetent, because, *inter alia*, it was really a question between creditors, and the heir was therefore not the 'party.'[5] Where a reference has been made to the oath of two parties jointly, it is incompetent to sustain it as a reference to the oath of one of them.[6]

Writ of party.

The writ of the defender, whereby the debt may be established, need not be a duly authenticated document. A mere jotting, holograph of the debtor, if manifestly admitting the debt, has been sustained as sufficient.[7] Nor is it necessary

[1] *Neill & Co.* v. *Hopkirk*, 1850, 12 D. 618.

[2] *Neill & Co.* v. *Campbell*, 1849, 11 D. 979.

[3] *Nisbet's Trustees*, v. *Morrison's Trustees*, 1829, 7 S. 307.

[4] *Duncan* v. *Forbes*, 1831, 9 S. 540.

[5] *Little* v. *Graham*, 1826, 4 S. 429.

[6] *Bertram* v. *Stewart's Trustees*, 1874, 2 R. 255.

[7] See *Donaldson* v. *Murray*, 1766, M. 11, 110.

that the constitution or existence of a debt should be expressly admitted. If they can be reasonably inferred from the writ, that will be held to prove the pursuer's case. Where the letter of a factor admitted that there was an old claim of the pursuer against the defender, his employer, which it would be agreeable to the defender to have settled, the Court, holding this letter to be constructively writ of party, found that, judging by the tenour of the whole correspondence, it established the constitution and subsistence of the debt.[1] But a letter from a country agent employing an Edinburgh agent was held not to prove the constitution of a debt due to the latter by the clients of the former, in the absence of authority, either general or special, from the clients to the country agent.[2] Again, where the defender had in a letter denied liability in these terms: 'I do 'not hold myself liable, and decline to recognise any claim by 'you against me,' constitution having been proved by unequivocal writ of party, this was held to prove the resting-owing of the debt.[3] In *Stevenson* v. *Kyle*,[4] the defender admitted in a holograph letter the existence of 'an account.' The pursuer averred, the defender denied, that this was the account sued for, and the defender pleaded triennial prescription. It was held competent to call for the production of letters from the pursuer to which the defender's were in answer, in order to show what was the account therein referred to—certainly a very liberal interpretation of the Act. In *Fiske* v. *Walpole*,[5] a letter from defender to pursuer, speaking of 'my debt,' was held to be so unequivocal an acknowledgment of his obligation as to dispense with the necessity of proving the tenour of a letter of the pursuer's to which the defender's was in answer. On the other hand, a plaintive letter from the defender, which might be construed into an acknowledgment of the debt sued

[1] *Smith* v. *Falconer*, 1831, 9 S. 474.

[2] *Wallace* v. *M'Kissock*, 1829, 7 S. 542.

[3] *Macandrew* v. *Hunter*, 1851, 13 D. 1111.

[4] 1849, 11 D. 1086.

[5] 1860, 22 D. 1488.

for, but made no express reference to it, was held not to constitute writ in the statutory sense.[1]

Account books as writ of party.

Mr. Erskine says that a book of accounts regularly kept by the debtor, in which he has 'charged himself with the particular debt in question, will fix that debt effectually upon 'him.' But though an entry in the debtor's books may sufficiently establish the constitution of an obligation against himself, the regularity with which his books are kept forms so important an element in the proof which they can afford of resting-owing that the proposition must be received with great caution. It has indeed been decided that the books of a corporation are to be regarded as *unum quid*, and are constructively writ of party; so much so, that the absence of an entry of the discharge of a debt is sufficient to satisfy the requirements of the statute as regards proof of resting-owing.[2] But where a law-agent sued the creditors upon a sequestrated estate for payment for work done on the employment of the trustee, and where the constitution of the debt was proved by an entry in the trustee's books, the absence of an entry of payment of the debt was held not to establish resting-owing.[3] It is to be noted, too, that an entry in a debtor's books whereby it is sought to establish a debt must unequivocally apply to the specific debt in question, and must afford distinct evidence that that debt was constituted.[4] Writ of the pursuer, though recovered out of defender's hands, is not to be taken as writ of the defender.[5]

Date of writ.

With regard to the date of the defender's writ by which it is sought to prove resting-owing, Mr. Bell opines that, 'if the 'writing is dated within the three years, it is not held enough 'that it shows the debt to have been in existence during the

[1] *Mitchells* v. *Moultrys*, 1882, 10 R. 378.

[2] *Leslie* v. *Magistrates of Brechin*, 15 Nov. 1808, F. C.; *Buchanan* v. *Magistrates of Dunfermline*, 1828, 7 S. 35.

[3] *Ellis* v. *White*, 1849, 11 D. 1347.

[4] *Nisbet's Trustees* v. *Morrison's Trustees*, 1829, 7 S. 307.

[5] *MacPherson* v. *Williamson*, 1865, 3 M. 727. Cf. *Campbell* v. *Grant*, 1843, 5 D. 755.

'three years, since the presumption of payment still remains; 'it would seem to be requisite that the writing should be 'intended to constitute the debt as on a new footing, to serve 'as a voucher to the creditor for his debt.'[1] In *Smith* v. *Falconer*[2] and in *Macandrew* v. *Hunter*,[3] there was little difficulty, for there the date of the documents which were held to establish resting-owing was so close to the date of the raising of the action as to leave no room for the question whether payment might not have been made in the interval. In *Stevenson* v. *Kyle*,[4] however, a year intervened between the constructive acknowledgment and the raising of the action; and in order to get rid of the difficulty as to the possible presumption of payment having been made during these twelve months, Lord Ivory laid great stress on the fact that both dates occurred *after* the expiration of the statutory period, that thus the defender's letter constituted a voucher for the debt, and that there was no evidence of its discharge. But there is nothing of this distinction in the statute, and perhaps the better opinion is that the character of a writ and not its date is the proper test of its sufficiency to prove constitution and resting-owing. At all events, in *Thomas* v. *Stiven*,[5] the plea of prescription was repelled expressly on the ground that there was a written admission by the debtor of the subsistence of the debt, though that admission was granted within three years; just as in *Davidson* v. *Hay*,[6] letters of the debtor, dated within the three years and not special as to the particular account or amount thereof, had been held to elide the plea of prescription by proving constitution and resting-owing. The character of the writ, then, and not its date, being of capital importance, and considerable latitude being allowed in its construction, the debtor who desires to plead the triennial prescription with success will do well to follow Lord

[1] Comm. I. 349.
[2] 1831, 9 S. 474.
[3] 1851, 13 D. 1111.
[4] 1849, 11 D. 1086.
[5] 1868, 6 M. 777.
[6] 1806, Hume, 460.

Fullerton's advice,[1] and not write at all but maintain an absolute silence.

When no writ of the defender is produced, the proof of constitution and resting-owing depends entirely on his oath; or if the constitution only of the debt be established by writ, the resting-owing must be referred to his oath; and where a pursuer has acquiesced in an interlocutor of the sheriff sustaining the defender's plea of prescription, and holding the defender's oath thereafter negative of the debt sued for, he cannot be heard to maintain in the Court of Session that prescription is inapplicable.[2] We have seen that the defender is not bound to allege payment to clear himself. It is for the pursuer to establish the fact of non-payment by his party's oath; not for the defender to prove that the debt has been discharged. Hence, where there was not enough in a defender's deposition to show whether a qualification of his admission of the debt was intrinsic or extrinsic (see *infra* p. 144), and where it was impossible, owing to his death to re-examine the defender, the pursuer was found to have failed to instruct his case.[3] But there need not be any explicit admission of non-payment on the part of the defender to establish resting-owing; nor will his bare statement denying constitution or subsistence necessarily end the matter. The pursuer is entitled to interrogate him with a view to testing his assertions; and it is for the Court to decide *quid juratum est.* If his answers to the pursuer's interrogations are such as to infer non-payment, though it be not expressly admitted, the Court will hold his oath affirmative of the reference. The natural consequence of this discretion has been the exhibition of two distinct and conflicting tendencies; one, to accept a bare statement of *nihil memini* or *nihil novi* on the part of the defender as at once conclusive against the claim of the

Oath of party

to be construed by Court.

[1] *Macandrew* v. *Hunter*, 1851, 13 D. 1111.

[2] *Macdonald* v. *Burden*, 1829, 7 S. 306.

[3] *Cooper* v. *Marshall*, 1877; 5 R. 258.

pursuer;[1] the other, to demand something much more explicit than an expression of belief that the debt has been paid, and to require the production of the grounds on which that belief is based.[2] The inclination towards this less stringent view has indeed been carried so far that the provision of the statute seems to be lost sight of. In *Cooper* v. *Hamilton*,[3] the defender deponed that he believed the debt had been paid, and based his belief on his factor's books, to which reference was allowed, and which showed that the debt had never been paid. It was held that the defender's oath had established resting-owing; in other words, that any document appealed to for corroboration by the defender in his oath must be taken to be imported into his disposition. Had the defender not referred to his factor's books as the ground of his belief, or persisted in refusing to adduce any such ground at all, resting-owing could not have been proved. So it was held that the books of a firm referred to by the son of one party in an oath on reference amounting to *nihil novi*, may be examined by the Court in order to understand the precise nature of the oath.[4] A party having deponed in an oath on reference that a statement in an article of his condescendence was true, that statement was held to have been thereby imported into his oath, though it was observed that in order to make documents part of an oath on reference, the defender must be examined specifically on the matters therein contained.[5] Nay, if a party refer to documents as confirming his oath, not only may they be produced and held to be imported into his oath, but the inference he draws from them may be overruled.[6] But the mere production by a deponent in a reference to oath, on the call of the other party, of

Documents when imported into oath.

[1] *Fyfe* v. *Miller*, 1837, 15 S. 1188, p. Lord Mackenzie.

[2] *Campbell* v. *Jolly*, 1824, 3 S. 25, p. Lord Craigie.

[3] 1824, 2 S. 609; aff. 1826, 2. W. and S. 59.

[4] *Berry's Representatives* v. *Wight*, 1822, 1 S. 402.

[5] *Jackson* v. *Cochrane*, 1873, 11 M. 475.

[6] *Hunter* v. *Geddes*, 1835, 13 S. 369.

documents, and his deposition that they all had relation to the matter referred, and were genuine, was held not to import these documents into the oath so as to form part of it.[1]

Interpretation of oath.

'No oath with respect to which a previous decision has been 'pronounced can be treated as a precedent to rule a future case, 'though no doubt if there be any principles deducible from the 'decision these may be of authority.'[2] In as much as the interpretation of every oath on reference necessarily depends upon its own terms and upon the special circumstance of the case, it is no easy matter to lay down any general rules of construction. In the class of cases where the defender depones, not that he paid the debt himself, but that he gave money to some one else to pay it for him, the import of the oath seems to depend upon the question whether it belongs to the character of the person to whom the money is alleged to have been given to make such payment. Thus in *Mette* v. *Dalyell*,[3] which was settled by a compromise, Lord Balgray expressed a doubt whether, when the debtor had selected a common carrier as his mandatory, and deponed to being afterwards told by that mandatory that he had transmitted the money to the creditor, such a deposition must not be taken as establishing resting-owing; and in *Goodall* v. *Hay Newton*,[4] which was also compromised, an opinion was indicated that, in respect the defender did not allege that he had personally paid the debt, he must be held liable for it: a very sweeping proposition. More satisfactory perhaps, and certainly less extreme, is the decision in *Crichton* v. *Campbell*,[5] where the defender having deponed that he had paid the money to a relative to discharge the claim sued for, but that he had never seen a discharge or been told that the debt was paid, this deposition was held to be affirmative of resting-owing. But if the discharge of such obligation be

[1] *Gordon* v. *Pratt*, 1860, 22 D. 903.

[2] *Fyfe* v. *Carfrae*, 1841, 4 D. 152, p. Lord-President Boyle.

1830, 8 S. 387.

1825, noted 8 S. 387.

[5] 1857, 19 D. 661.

properly the function of the mandatory (*e.g.* if the mandatory be the debtor's wife, *praeposita negotiis*, or be the debtor's factor)[1] the oath of the debtor that he has given his mandatory money to pay will clear him. Where the debtor deponed that he had paid the debt to the pursuer's traveller, resting-owing was held proved because the only payment alleged was to one whose discharge was not binding on the creditor.[2]

'Intrinsic' and 'extrinsic' quality.

But the commonest case is where, on reference to his oath, the defender admits the constitution of the debt but qualifies his admission by the adjection of certain statements, *e.g.* that the debt has since been paid or otherwise discharged. The Court has then to determine whether this adjected qualification is *intrinsic* or *extrinsic*; whether it is 'inherent in the act and 'matter in question,'[3] and probative, or whether the fact it alleges requires further proof *pro ut de jure*. The simplest instance of an intrinsic qualification is the assertion of payment. W. N. sued A. M'K. for repayment of a loan of £300. In the cash-book of the defender's father (whose managing clerk defender was) appeared an entry in the defender's writing, 'to A. M'K. p. W. N. £300.' On reference to oath, the defender deponed to receipt of that sum from the pursuer, but added that it had been repaid. It was held that the constitution of the debt had been proved not by writ, but by oath of the defender, and that the quality of payment adjected was intrinsic.[4] The simplest case of an extrinsic qualification is where the debt is admitted, but the defender depones that the sum sued for is not that agreed upon. This qualification is not accepted upon the mere statement of the defender, but has to be proved in the ordinary way.[5]

Cowbrough v. *Robertson.*

The practical application of the distinction between intrinsic and extrinsic qualification is often a matter of great delicacy.

[1] *Mackay* v. *Ure*, 1849, 11 D. 982.
[2] *Smith* v. *Ivory*, 1807, Hume, 462.
[3] Dirleton's *Doubts*, p. 132.
[4] *Newlands* v. *M'Kinlay*, 1885, 13 R. 353.
[5] *Fife* v. *Innes*, 1860, 23 D. 30; *Napier* v. *Smith*, 1838, 1 D. 245; *Turnbull* v. *Borthwick*, 1830, 8 S. 735.

The judgment of Lord Deas, however, in *Cowbrough* v. *Robertson*,[1] has done for this branch of the subject what the judgment of Lord Justice-Clerk Hope in *Alcock* v. *Easson*[2] did for the great principle of the statute. In *Cowbrough* the defender, on reference to his oath, admitted the constitution of the debt in question, but swore that it had been subsequently discharged by the pursuer accepting certain unpaid accounts of his in lieu of payment. The pursuer maintained that what a debtor depones to as having been stipulated, or as having taken place after the admitted constitution of the debt, is always extrinsic, unless the qualification amounts to a payment of the debt in money. The Court, on the contrary, held that the quality of the defender's oath was intrinsic and negative of resting-owing; and Lord Deas laid down the following propositions:—

Stipulation at time of contract as to extinction.

1. If the oath bear that some other mode of satisfaction or extinction than payment in money was stipulated or bargained for at the contraction of the debt, that other mode, if the debtor swears it was acted upon, will be a competent and intrinsic quality of the oath.

Subsequent agreement as to extinction.

2. If the debtor depones to an express subsequent agreement to hold the debt satisfied or extinguished by some other specific mode than payment in money, that other mode will be a competent and intrinsic quality of the oath.

Thus, in *Wilson* v. *Wilson*,[3] an action for repayment of an advance of money, the defender deponed on reference that he had received the money, but that he had repaid it with flour. There being no deposition that it was part of the original transaction that the debt should be so extinguished, or that the creditor afterwards agreed to such extinction, the quality of the oath was found to be extrinsic, and the oath held to be affirmative of the reference. In *Thomson* v. *Duncan*[4] the defender on oath admitted the constitution of the debt sued for, but deponed (*a*) that when the sum was lent he made an agree-

[1] 1879, 6 R. 1301.
[2] 1842, 5 D. 356.
[3] 1871, 9 M. 920.
[4] 1855, 17 D. 1081.

ment with the pursuer that it should be repaid in the board and lodging of the pursuer's son, and that part of the debt had been so discharged; (β) he deponed also that, some years later, he and the lender agreed that the remainder of the debt should be discharged by the lender boarding with him, and that it had been so discharged. It was held as to the first portion of the deposition that the qualification was intrinsic, being part of the original bargain (Lord Justice-Clerk Hope dissenting on the ground that only 'loose conversations' had been deponed to), but that the second portion was extrinsic, some judges, it is true, putting it on the ground that it was posterior to the original bargain, but Lord Wood explicitly disclaiming that ground. But an allegation of payment by the debtor to a third party on behalf of the pursuer is extrinsic; and where the defender admitted the constitution of an obligation, but deponed that, *inter alia*, he had paid a sum for the creditor on a decree of forthcoming, which was not produced, his oath was held to be affirmative of the reference, unless the decree should be produced.[1] In *Law* v. *Johnston*[2] it was laid down that an explicit *ex post facto* agreement to hold a debt of the kind now in question discharged or extinguished for any reason whatsoever is intrinsic of the oath; so that Lord Neaves's observation in *Gow's Executors* v. *Sim*,[3] that nothing in general can be intrinsic which is not contemporaneous with the constitution of the debt must probably be taken under considerable reservations. But, in any case, it must appear from the oath that there has been a positive agreement of the sort between the parties; and where it was admitted that certain balances remained unpaid, but added that they had been extinguished by an agreement to allow counter-claims, and where it appeared that there had been merely an understanding on the defender's part that it had been so agreed, the defender was found liable for

[1] *Blair* v. *Balfour*, 1748, M. 13, 217.

[2] 1843, 6 D. 201.

[3] 1866, 4. M. 578.

the balance claimed, though his counter-claims were reserved.[1]

Subsequent agreement to forgive debt.

3. An express subsequent agreement to forgive the debt in whole or in part, deponed to by the debtor, will in like manner be intrinsic, and receive effect accordingly, because so far as thus deponed to the debt cannot be said to be as resting-owing.

Compensation.

4. But an oath that the debt has been compensated is usually held extrinsic, because compensation, if not sworn to have been agreed to and sanctioned by the creditor, usually involves matter of law, and though the deponent may establish any relevant matter of fact by his own oath, he cannot thereby establish matter of law.

In *Hepburn* v *Hepburn*,[2] it was regarded as a settled point that claims of compensation in an oath of reference are extrinsic, unless the mutual claims of parties have been applied to each other by some regular settlement or action of the parties. 'Compensation can never be intrinsic,' said Lord Neaves[3]; and that proposition, subject to the above qualification, had been expressly re-asserted from the bench in *Mitchell* v. *Ferrier*.[4] On the same principle, where a writer sued for payment of a prescribed account, and the deposition of the defender established the employment of the pursuer, the oath of the defender that he did not think that he was indebted to the pursuer for his account, was found to be, not a statement of fact, but an expression of opinion on a point of law; and therefore to be affirmative of the reference.[5] In an action on a prescribed account, the defender's sole plea was compensation on a prescribed account due to him by the pursuer. It was held that the *onus* lay on the defender of proving his counter-account by the writ or oath of the pursuer.[6]

Qualification of constitution.

To cases where the fact of constitution is only admitted

[1] *Hunter* v. *Lord Kinnaird's Trustees*, 1830, 9 S. 154.

[2] 1806, Hume, 417.

[3] *Gow's Executors* v. *Sim*, 1866, 4 M. 578.

[4] 1842, 5 D. 169.

[5] *Grant* v. *Wishart*, 1845, 7 D. 274.

[6] *Miller* v. *Baird*, 1819, Hume, p. 480.

under qualification, the Court has applied very much the same tests as those just indicated. If the defender depones on oath or avers on record that the goods were indeed furnished, but on the credit of a third party, and not of himself, the constitution of the debt is held not to be proved.[1] Where the defender in a reference to his oath admitted that he had received the money from the pursuer, but added that nothing was said about repayment, this deposition was held affirmative of constitution and resting-owing.[2] But where in an action for repayment of money advanced on loan, the defender deponed on oath that she had got the money as a free gift, such an oath was held to be as sufficient an answer to such a libel as a denial of the contract of sale to a claim for the price of goods sold.[3] Where the trustees of a solicitor raised an action for payment of an account said to be due to the solicitor, and the defender deponed on oath that he had only employed the solicitor on condition of the latter claiming no fee, unless the action for the purpose of which he was employed should be successful, the Court held that the defender's oath had proved a different contract from that libelled on, and was therefore subversive of the claim.[4] Where a first-mate demanded payment of his wages, and the master of the vessel upon oath adjected to his admission of employment, the qualification that he had engaged the pursuer as second-mate, the quality of the oath was found intrinsic.[5] But where, in answer to a seaman's claim for wages, the master qualified his oath by an allegation of undutiful service, the quality was held to be extrinsic; the master's remedy for undutiful service lying in a separate action.[6] Where the defender deponed on oath that there was such a bargain as that libelled, but that it was agreed that it should

[1] *Meyer and Mortimer* v. *Lennard*, 1851, 14 D. 99.

[2] *Gaylor* v. *Crighton*, 1854, 27 S. J. 35.

[3] *Stewart* v. *Walpole*, 1804, Hume, 416.

[4] *Knox* v. *M'Caul*, 1861, 24 D. 16.

[5] *Paden* v. *Govan*, 1751, M. 13, 207.

[6] *Workman* v. *Young*, 1699, M. 13, 234.

be reduced to writing, and that before the writings were perfected he had resiled, the quality of his oath was found intrinsic;[1] and the decision was the same where a defender admitted receiving money from the pursuer, but added that the money was in payment of a debt due by the pursuer to him, and that he had made no promise of repayment.[2] In answer to a claim for payment for goods furnished, the defender deponed that he had received the goods in consequence of an agreement to teach the pursuer the violin and to paint certain portraits; and this qualification was found to be intrinsic.[3] So where a pursuer claimed payment of the price of certain wines supplied to the defender, and the defender qualified his acknowledgment of the bargain by adding that he had refused to accept the wines because they were bad, the quality of the oath was held to be intrinsic.[4]

Judicial admission in lieu of oath.

A judicial admission by a defender of the constitution and resting-owing of the debt sued for will supersede the necessity of proof by oath. Wherever a defender admits on record what, if admitted on oath, would have sufficed to elide prescription, it would be mere 'supererogation, and indeed worse than super-'erogation, to have recourse to a reference to oath. A party 'cannot be heard to say that he has a right to be allowed an 'opportunity of emitting a deposition contradictory of his 'deliberate judicial admissions; and if he is merely to depone 'consistently with them, his deposition would leave matters 'just where they are.'[5] It is taken for granted that the oath will coincide with the admission, and what is extrinsic or intrinsic of an oath on reference will also be held extrinsic or intrinsic of a statement made on record. Thus against a claim for furnishings on the defender's employment 'as *per* account,' the defender alleged a specific contract for furnishings with the

[1] *Campbell* v. *Douglas*, 1676, M. 13, 203.

[2] *Aitken* v. *Finlay*, 1702, M. 13, 205.

[3] *Lauder* v. *M'Gibbon*, 1727, M. 13, 206.

[4] *Trotter* v. *Clark*, 1687, M. 13, 204.

[5] *Ritchie* v. *Little*, 1836, 14 S. 216 (p. Lord Gillies).

pursuer's author at a fixed price, which the pursuer had failed to fulfil. This was held not to be an admission of the constitution of the debt, so that both constitution and resting-owing remained to be proved by the defender's oath.[1] On the other hand, the necessity for reference to a defender's oath was obviated by a statement in the defences that the account sued for was not resting-owing, 'being entirely extinguished by counter-'claims;'[2] and 'compensation,' as we have seen, 'never can be 'intrinsic.'[3] Where the triennial prescription was pleaded against a claim for payment of a surgeon's account, but the constitution and non-payment of the debt were admitted on record, the Court repelled the plea.[4] The case of *Maule* v. *Sommers*[5] stands on a somewhat different footing, for there, in the original action for payment of a tavern bill, the defender put forward no plea of prescription, though he averred his belief that he had settled all claims, and agreed that if the pursuer could show that anything remained unpaid he would cheerfully pay it, and it was not until he sought to suspend a charge following upon a decree passed in absence that he pleaded the statute. The Court then held that he was barred from pleading the triennial prescription at that stage, 'in respect of the terms 'of the defences lodged by him.'

Rule that judicial admission supersedes oath may be carried too far;

But the principle that judicial admissions are to be accepted in lieu of oath must be applied with great caution; otherwise a defender will practically be debarred from pleading any alternative defence.

In *Anderson* v. *Hally*[6] the pursuer claimed six years' wages. The defender (1) denied that there had been any contract of service, and (2) pleaded triennial prescription as to a portion of the sum claimed. The Lord Ordinary sustained the plea of

[1] *Morison* v. *Robertson's Executors*, 1863, 1 M. 822.

[2] *Mitchell* v. *Ferrier*, 1842, 5 D. 169. See *Gordon* v. *Innes*, 1826, 4 S. 585.

[3] *Gow's Executors* v. *Sim*, 1866, 4 M. 578, p. Lord Neaves.

[4] *Bryson* v. *Aytoun*, 1825, 4 S. 182. See *Broughton* v. *Weston*, 1826, 4 S. 501.

[5] 1822, 1 S. 475.

[6] 1847, 9 D. 1222.

prescription, and referred to the defender's oath (which negatived the constitution of the debt), though the pursuer had maintained that the defender's denial of the contract barred him from pleading the statute, because it amounted to an admission of non-payment. No doubt in that case the Court found it unnecessary to determine that point, because the pursuer had not reclaimed against the Lord Ordinary's interlocutor sustaining the plea of prescription. But the previous case of *Clyne* v. *Snody*[1] had supplied a striking example of the lengths to which the Court was prepared to go, and is worth noting as the best conceivable illustration of how not to deal with the plea of prescription. The Court, it is submitted, went wrong on every point where error was possible. Clyne, S.S.C., sued Snody, S.S.C., for payment of certain accounts for law-agency. Snody pleaded:—(1.) Prescription. (2.) An alleged understanding that he, Snody, was not to be liable, unless he recovered the amount from his clients. The Lord Ordinary began the series of mistakes by finding no evidence produced of the alleged understanding, and by decerning against Snody without pronouncing any special judgment upon the plea of prescription, which, if sustained, might have rendered any enquiry into the allegation superfluous. The Inner House, upon a reclaiming note, found no evidence of the understanding, but remitted to hear parties on the defence of prescription, which, of course, should have been dealt with at the very beginning of the case. The Lord Ordinary next repelled the plea of prescription, and the Inner House adhered upon these extraordinary grounds: (1.) That the accounts of the *pursuer*, coupled with certain letters of the defender, afforded proof *scripto* of the pursuer's employment: a direct violation of the terms of the statute; and, (2.) That there was no allegation of payment on the part of the defender.

It is not, perhaps, surprising that the Court should have

[1] 1830, 8 S. 566, 1004.

and the Court has thrown grave doubt on it.

taken alarm at the tendency to carry the principle that a judicial admission is equivalent to the defender's deposition, to an extent which threatened to render the statute practically inoperative. In *Alcock* v. *Easson*,[1] Lord Justice-Clerk Hope pointed out that the denial of the debt, the absence of which had been founded on as tantamount to a statutory admission of non-payment, is necessarily contained in the statutory defence. The course of pleading in Scotland requires not only that all defences should be put upon record at the outset of the case as pleas, but that the whole statements in support of each of them should be made at once; and the risk of this is that defences which are peremptory and general may not be disposed of first as they ought to be, before details of the facts applicable to a different view of the case, and intended to meet a different ground of judgment, are considered. 'To 'begin with applying to the statements *hinc inde* in the 'pleadings all the ordinary rules and presumptions and infer- 'ences as to the legal obligations of parties, and as to the con- 'stitution and subsistence of debts, and then by the aid of these '(whether collected from pleadings or proof seems equally in- 'competent) to hold that the statute does not apply, is revers- 'ing the whole order of procedure.' In the same strain in *Darnley* v. *Kirkwood*[2] (a case of a prescribed bill: see *infra* p. 162), where an admission on record of partial payment was founded on as constructively a statutory admission of the subsistence of the debt, Lord Fullerton very pertinently asked, How does such an admission prove resting-owing of the balance? and while granting the proposition that a party cannot be allowed to maintain that he means to contradict on oath that which he avers on record, laid down that a judicial admission, to be equivalent to defender's oath, must be 'express and 'unequivocal.' No mere inferences or presumptions from the defender's failing or declining to aver or deny something which the pursuer maintains he was bound to aver or deny, will be

[1] 1842, 5 D. 356, 366.

[2] 1845, 7 D. 595.

sufficient. It must be an admission which, if made upon oath, would have proved the defender's case. In this action, indeed, Lord Jeffrey threw grave doubt upon the view that the necessity of writ or oath may be superseded at all by the tenor of admissions. He granted that in the Outer House he had held them to be *scripta* of the party, but added that he thought that was not a sound view. In *Cullen* v. *Smeal*[1] Lord Justice-Clerk Hope recurred to these doubts, and expressly refused to decide, as being outside the scope of that case, whether judicial admissions are to be taken as writ or oath of party, or whether, if the defender requires it, the matter must not be put to his oath.

[1] 1853, 15 D. 868.

CHAPTER XII

OF THE QUINQUENNIAL PRESCRIPTION

§ 1. ARRESTMENTS

(ERSK., *Inst.*, 3. 7. 20)

Act 1669, c. 9: arrestments.

THE Statute 1669, c. 9, establishes a quinquennial prescription of arrestments, whether these proceed on decrees, registered obligations, or depending actions. Where the arrestment follows upon a decree, or registered bond, the prescription runs from the date of the arrestment. Where it is grounded on a depending action, the five years do not begin to run till the date of the decree constituting the debt.[1] The course of prescription may be interrupted by action taken upon the arrestment. Thus a process of multiplepoinding brought in consequence of an arrestment will preserve that arrestment from prescribing,[2] even though the arrester's interest be not produced in the process;[3] and an execution of a citation (given on the last day of the five years) not lodged till two years after the beginning of an action of forthcoming was held in the circumstances sufficient evidence that the citation had been regularly given so as to interrupt prescription.[4] But a suspension is not a sufficient interruption.[5]

1 and 2 Vict. c. 114.

By 1 and 2 Vict. c. 114 the period of prescription suffered

[1] *Crawford* v. *Simpson*, 1732, M. 11, 049; *Paterson* v. *Cowan*, 1826, 4 S. 482.

[2] *Graham* v. *M'Farlane*, 30 May 1811, F. C.

[3] *Macmath* v. *Campbell*, 1802, M. 11, 051.

[4] *Cameron* v. *M'Ewen*, 1830, 8 S. 440.

[5] *Paterson* v. *Cowan*, 1826, 4 S. 482.

by arrestments is reduced to three years, and it is provided that, where arrestments proceed upon future or contingent debts, the three years are to be counted as running from the time when the debt becomes due, or the condition is purified. Otherwise the law remains unchanged. A creditor arrested on decree a fund vested in his debtor, and within the three years the debtor obtained *cessio*. The creditor appeared in that process, but did not found on his arrestment, and, in fact, did nothing which he might not have done if he had not arrested. It was held that the arrestments were prescribed, not having been pursued or insisted in within three years.[1]

§ 2. STIPENDS AND RENTS.

(ERSK. *Inst.* 3. 7. 20.) (BELL. *Prin.* § 634.)

The same Act provides, 'that ministers' stipends and 'multures not pursued for within five years after the same are 'due, and likeways mails and duties of tenants not being pur- 'sued within five years after the tenant shall remove from 'the lands for which the mails and duties are craved, shall 'prescribe in all time coming, except the saids ministers' 'stipends, mails and duties shall be offered to be proven to be 'due and resting-owing by the defenders their oaths, or by a 'special writ under their hands, acknowledging what is resting- 'owing.' Act 1669, c. 9.

As regards stipends, the Act applies even when the charge was vacant during the time for which the stipend was payable.[2] It did not, however, apply to the right of a patron to recover from the other heritors their proportion of what he had expended upon ann and other pious objects.[3] Stipends.

[1] *Jameson* v. *Sharp*, 1887, 14 R. 643.

[2] *Glong* v. *Macintosh*, 1753, M. 11, 063.

[3] *Graham* v. *Pate*, 1799, M. 11, 063.

Rents.

As regards mails and duties, Mr. Erskine says[1] that the prescription was introduced by reason of the rusticity of *bonâ fide* tenants, and that its application must be confined exclusively to their case. Thus, where a fiar had possessed upon a tack from the liferenter, and upon the death of the latter continued in possession of the lands, it was held that the Act did not apply to arrears of rent due by him to the liferenter, and sued for more than five years after they became due.[2] This principle was also carried out in a case where a tack of mails and duties was held to fall outside the Act, on the ground that the tacksman was not a tenant in natural possession by labouring the ground.[3] A tack of a whole estate, however, was found subject to the prescription,[4] and the Court has even held the Statute applicable to an obligation to relieve of rent and to make an annual prestation.[5]

The Act is equally applicable whether the tenant's lease be written or verbal, and whether the subjects be urban or rural.[6] It only applies where the tenant has removed (even, indeed, where he has run away),[7] and so was held inapplicable where a tenant remaining in possession was sued by the former proprietor for arrears due five years before the estate had been sold.[8] The prescription may be pleaded by a cautioner for the tenant as well as by the tenant himself.[9] There is no room for its operation where a landlord has raised a process of sequestration against his tenant, and an account between them has been docqueted, and thus become equivalent to an acknowledgment of the arrears being due.[10] But where sequestration and arrestment had been only in security, before the term of

[1] Inst. 3, 7. 20.

[2] *Murray* v. *Trotter*, 1709, M. 11, 054.

[3] *Nisbet* v. *Baikie*, 1729, M. 11, 059.

[4] *Fairholm* v. *Livingstone*, 1725, M. 11, 058.

[5] *Daes* v. *Scougal*, 1710, M. 11, 056.

[6] *Boyes* v. *Henderson*, 1823, 2 S. 169.

[7] *M'Intosh* v. *Baillie*, 1753, Elch. Prescr. 35.

[8] *Strahorn* v. *Cunningham*, 1739, M. 11, 059.

[9] *Duff* v. *Innes*, 1771, M. 11, 059.

[10] *Hogg* v. *Low*, 1826, 4 S. 708.

payment of rent had arrived, the plea of interruption of prescription was repelled.[1] A landlord indebted to his tenant may not plead prescribed arrears of rent against his tenant's claim for payment of the debt.[2] On the other hand, where a tenant retained rents in his hands by way of security for a claim for ameliorations made by him, and where, having been found entitled to a sum for ameliorations subject to compensation for arrears of rent due by him, he pleaded that the rents were prescribed and could not set off against him in compensation, his plea of prescription was repelled.[3] The judicial statement of a claim for arrears of rent by way of compensation against a claim by the tenant will exclude the prescription.[4] Payment of interest made after the prescription has run, and instructed by the defender's writ, will prove resting-owing. But payments not admitted on record or proved by the defender's writ, will prove nothing;[5] and partial payments made within the five years found no interruption of prescription, as tending rather to fortify the presumption that all bygones are cleared.[6]

Reference to oath.

Upon reference to oath, as has been already explained, there is no obligation on the defender to instruct payment. Where a tenant deponed that he had not paid a sum claimed by his landlord as balance of a year's rent, but that the landlord had sequestrated and paid himself, it was held that the deposition did not prove resting-owing; and that as the landlord had not laid the process of sequestration before the deponent and examined him upon it, and thus made it part of his oath, the deponent's statement could not be contradicted by showing from the process of sequestration that the sum in question was unpaid.[7]

[1] *Cochrane* v. *Ferguson*, 1831, 9 S. 501.

[2] *M'Intosh* v. *Baillie*, 1753, M. 2, 680.

[3] *Nicolson* v. *M'Alister*, 1832, 10 S. 759.

[4] *Macdonald* v. *Jackson*, 1826, 5 S. 26.

[5] Dickson on Evidence, I. § 482. (474).

[6] *Nisbet* v. *Baikie*, 1729, M. 11, 059.

[7] *Heddle* v. *Baikie*, 1847, 9 D. 1254.

§ 3. BARGAINS CONCERNING MOVEABLES, ETC.

(Ersk. 3. 7. 20.)
(Bell, *Prin.*, § 593.)
(Bell, *Comm.* i. 347.)

Act 1669, c. 9.

The Act 1669, c. 9, farther provides, 'that all bargains 'concerning moveables or sums of money, provable by wit- 'nesses, shall only be provable by writ or oath of party if the 'same be not pursued within five years after the making of 'the bargain.'

Moveables.

This enactment applies to sale, hiring, loan, deposit, and pledge of moveables. It embraces transactions as to single articles which do not come within the category of merchants' accounts; though in view of the decision in *Gobbi* v. *Lazzaroni*,[1] it is difficult to distinguish between cases that fall within this statute, and those that fall within the Act 1579, c. 83. The 1669 Act, at all events, is applicable to the sale of a cow,[2] to a bargain about victual,[3] and to the sale of a flock of sheep.[4] But it does not apply to transactions between a commission agent and his principal,[5] nor to a consignment of goods in security for an advance.[6] Moreover, the operation of the prescription is strictly confined to bargains where the pursuer has to prove the contract by parole; and bargains constituted by writing are not affected by it.[7]

Writ or oath of party.

From the wording of the Act it has been questioned whether the subsistence, as well as the constitution, of the obligation has to be proved by the defender's writ or oath. But the Court has decided that the Act must be applied in the same

[1] 1859, 21 D. 801.

[2] *Nobles* v. *Armstrong*, 11 June 1813, F. C.

[3] *White* v. *Spence*, 1683, M. 11, 065.

[4] *Ewart* v. *Murray*, 1730, M. 11, 067.

[5] *M'Kinlay* v. *M'Kinlay*, 1851, 14 D. 162.

[6] *M'Farlane* v. *Brown*, 1827, 5 S. 189.

[7] *Earl of Southesk* v. *Simpson*, 1683, M. 12, 326; *Hunter* v. *Thomson*, 1843, 5 D. 1285.

way as the Act 1579, c. 83.[1] What has been said, therefore, with regard to a reference to defender's oath or proof by defender's writ in treating of the triennial prescription (*supra* p. 136), is equally applicable here. It need only be added that in *Kennard* v. *Wright*,[2] where the quinquennial prescription was successfully pleaded, it was held that a letter from the defender to his agent saying, 'I have to inform you that I paid 'the money to the party who had ordered [the article in ques- 'tion] for me,' was held not to prove the constitution of the alleged contract, and Lord Justice-Clerk Inglis expressed the opinion that, after resorting to proof by writ, it was not competent for the pursuer to resort to other pieces of evidence, such as statements culled from the record, and from the defender's deposition as a haver, so as to spell out a kind of *talis qualis probatio*.

§ 4. CERTAIN ACTIONS.

The Act 1669, c. 9, also provides 'that all actions proceed- Act 1669, c. 9.
'ing upon warnings, spuilzies, ejections, arrestments, or for 'ministers' stipends and others foresaids, shall prescryve 'within ten years, except the said actions be wakened every 'five years; but prejudice always of any of the saids actions, 'which by former Acts of Parliament are appointed to pre- 'scryve in a shorter time.'

But for this enactment, actions upon claims affected by the short prescriptions would have subsisted for forty years; and thus the intention of the law in establishing the short prescriptions would have been in great measure defeated. The provision of the statute was at first taken to mean that it was sufficient if the first wakening of such an action took place within ten years, and if the wakening were renewed every five years afterwards.[3] But the Act 1685, c. 14, declares that all such actions Actions upon warnings, etc.

[1] *Campbell* v. *Grierson*, 1848, 10 D. 361.

[2] 1865, 3 M. 946.

[3] *Countess of Wemyss*, 1684, M. 11, 321.

are to prescribe if the first wakening be not raised within five years after the action, which was to be used as an interruption, first began to sleep.[1] A depending action is said to sleep when no new step is taken in it for a year together.[2] The meaning of the saving clause Mr. Erskine confesses himself unable to comprehend, on the ground that there are no former statutes limiting the duration of actions to a shorter time. It is only the right to bring an action which previous enactments affect.

§ 5. MINORITY.

Minority.

The statute winds up with the express declaration that 'prescription shall not run in any of the cases foresaid against 'minors during the years of their minority.'

§ 6. INHIBITIONS.

37 and 38 Vict. c. 94, § 42.

The Act 37 and 38 Vict. c. 94, § 42, provides that inhibitions shall 'prescribe on the lapse of five years from the date 'on which such inhibitions shall respectively take effect.' But an inhibition may be kept alive for another five years by recording it again, or by recording a memorandum in the register of inhibitions before the expiry of the five years; and may be similarly renewed before the expiration of every subsequent period of five years.

[1] See *Graham* v. *M'Farlane*, 30th May, 1811, F. C.
[2] Ersk., *Inst.*, 3. 7. 27.

CHAPTER XIII

OF THE SEXENNIAL PRESCRIPTION

(Ersk. 3. 7. 29.) (Thomson on Bills, 457.)
(More *apud* Stair, II. cccxxii.) (Bell, *Prin.*, §§ 594-599.)
(Bell, *Comm.* I. 418.) (Dickson on Evidence, §§ 433-471 [424-463.])

The Statute 12 George III. c. 72, § 37 (made perpetual by 23 George III. c. 18, § 55), enacts that 'no bill of exchange 'Inland Bill or promissory-note executed after 15th day of 'May 1772, shall be of force or effectual to produce any 'diligence or action in that part of Great Britain called 'Scotland, unless such diligence shall be raised and executed, 'or action commenced thereon within the space of six years 'from and after the terms at which the sums in the said 'bills or notes became exigible.' By § 39 it is, however, provided 'that no notes, commonly called bank-notes or 'post-bills, issued or to be issued by any bank or banking 'company, and which contain an obligation of payment to the 'bearer, and are circulated as money, shall be comprehended 'under the foresaid limitation or prescription; and that it 'shall or may be lawful and competent, at any time after the 'expiration of the said six years, in either of the cases before 'mentioned, to prove the debts contained in the said bills and 'promissory-notes, and that the same are resting and owing by 'the oaths or writs of the debtor.'

12 George III., c. 72, and 23 George III., c. 18.

The prescription runs from the date at which the debt becomes exigible; that is to say (1) from the last day of grace in a bill payable on a named day, or so many days or months

Terminus a quo.

after date;[1] (2) from the date of the bill, in a bill payable on demand,[2] and in a bill payable at sight, which is now equivalent to a bill payable on demand;[3] and (3) from the last day of the second or third or fourth month, as the case may be, after the demand for payment has been made, in bills payable two or three or four months after notice.[4]

Effect of the statute.

The defence introduced by the statute, in the case of bills, is substantially identical in principle with that introduced by the Act 1579, c. 83, with regard to 'merchants' accounts,' etc.[5] The passing of the years of prescription upon a bill has the effect of destroying it as a document of debt,[6] and after the six years the bill proves nothing.[7] 'During the six years the bill 'proves itself, and the burden of disproving value or of proving 'payment lies on the debtor, and is, of course, limited to the 'writ or oath of the holder. After the lapse of six years, the 'burden of proving "the debt contained in the bill," and "that '"it is resting-owing," is laid upon the holder of the bill, and 'that, too, is limited to the writ or oath of his adversary.'[8] The pursuer must prove the debt, both in its constitution and its subsistence, as an unpaid debt between the parties at the date of the action; and must prove it by writ or oath of the defender.[9] Even where, after the six years, the defender departs from the plea of prescription by concurring in a proof *pro ut de jure*, that does not alter the rule as to the *onus probandi*, which remains upon the party founding on the bill.[10] A bill which has suffered prescription is not sufficient voucher of a claim in a sequestration to entitle the claimant to vote in the election of a trustee, even though the debt be that founded

Bill destroyed as document of debt.

[1] *Douglas, Heron & Co.* v. *Grant's Trustees*, 1793, M. 4602.

[2] *Stephenson* v. *Stephenson's Trustees*, 1807, M. Bill App., 20.

[3] 45 and 46 Vict. c. 61, § 10.

[4] *Broddelius* v. *Grischotti*, 1887, 14 R. 536.

[5] *Noble* v. *Scott*, 1843, 5 D. 723.

[6] *Denovan* v *Cairns*, 1845, 7 D. 378.

[7] *M'Neil* v. *Blair*, 1825, 3 S. 459.

[8] *Darnley* v. *Kirkwood*, 1845, 7 D. 595.

[9] *Noble* v. *Scott*, 1843, 5 D. 723; *Wood* v. *Howden*, 1843, 5 D. 507.

[10] *Simpson* v. *Stewart*, 1875, 2 R. 673; *Kerr's Trustees* v. *Ker*, 1883, 11 R. 108.

on by the concurring petitioner in the sequestration.[1] So the indorsation of a bill or note on which prescription has run is worth nothing, and can convey nothing, though an indorsation during the currency of the prescriptive period carries the debt as well as the document.[2] A charge upon a decree obtained in absence upon a prescribed bill will be suspended without caution or consignation.[3]

It has been thought that the writ or oath of the debtor rears up a bill for a second course of six years, and so it was decided in *Fergusson* v. *Bethune*.[4] A remark of Lord Justice-Clerk Moncreiff in the case of *Storeys* v. *Paxton*,[5] also seems to lend countenance to this view. But in 1823, the Court (p. Lord Pitmilly) declared emphatically against it,[6] and the decision in *Drummond* v. *Lees*[7] appears to leave no doubt that the defender's writ or oath does not raise up the bill, but establishes a debt only affected by the long negative prescription.

But debt contained in bill may be sued for,

While a prescribed bill can never be sufficient to found diligence,[8] nor afford in itself a sufficient ground of action,[9] the debt contained in the bill may be sued for, and hence the setting forth of the bill in the summons is permitted. 'I 'do not found on the bill as a document of debt, but I 'merely point to it as demonstrative or illustrative of the 'question put to the defender, that question being, Do you 'owe the debt expressed in that bill?'[10] Nay, the bill may be used as an adminicle of proof. While there must be evidence sufficient to prove resting-owing of the sum independently of the bill itself, the bill may be produced and read along with the other writs in order to show that such a

and the bill may be produced.

[1] *Lockhart* v. *Mitchell*, 1849, 11 D. 1341. See *Nisbet* v. *Nicoll*, 1856, 18 D. 1042.

[2] *Kerr's Trustees* v. *Ker*, 1883, 11 R. 108.

[3] Bell, *Comm.* i. p. 411 (314).

[4] 7th March 1811, F. C.

[5] 1878, 6 R. 293, 300.

[6] *M'Indoe* v. *Frame*, 1824, 3 S. 295.

[7] 1880, 7 R. 452.

[8] *Armstrong* v. *Johnstone*, 16th May 1804, F. C.; M. 11, 140.

[9] *Scott* v. *Brown*, 1828, 7 S. 192; *Stirling* v. *Lang*, 1830, 8 S. 638.

[10] *Laidlaw* v. *Hamilton*, 1826, 4 S. 644 (p. Lord-President Hope).

writ had existed.[1] 'The instrument itself is not annihilated,' says Lord Justice-Clerk Boyle. 'When the term of prescription has 'run, the presumption is that the *ex facie* obligant is free, and 'if the holder of the bill avers the contrary, he must prove 'resting-owing by writ or oath of the debtor. In doing so, 'however, he may produce the bill and use it as an adminicle 'of evidence.'[2] In a claim to be ranked in a sequestration, the creditor produced a letter from the bankrupt, dated more than six years before, acknowledging receipt of the principal sum, and enclosing a promissory-note of even date for that amount. While the letter was held to be sufficient evidence of the debt, Lord-President Inglis added an expression of opinion to the effect that 'although, the note being prescribed, the creditor 'cannot now found upon it as a document of debt, he may do 'so by way of evidence to prove the constitution of the debt, 'and the reference to the promissory-note, instead of in any 'degree derogating from the character of the letter, only tends 'to confirm the existence of the obligation. Moreover, the 'production of the note by the creditor shows that it was never 'retired, and removes the slightest suspicion of the debt having 'been paid.'[3] Thus the Court has held an action not incompetent though a prescribed bill was libelled on *inter alia*, Lord Craigie distinguishing the case where an action is brought on the bill alone, when the rights established by the Act in the defender are to be followed out (the case of *Stirling* v. *Lang*)[4] from the case where the party wishes not to confine himself to the bill and libels on the circumstances, using the bill as an adminicle of proof;[5] and in an action for the price of a horse for which a bill had been given more than six years prior

[1] *Storeys* v. *Paxton*, 1878, 6 R. 293 (p. Lord Ormidale).

[2] *Christie* v. *Henderson*, 1833, 11 S. 744.

[3] *Nisbet* v. *Neil's Trustee*, 1869, 7 M. 1097. See, too, *Campbell* v. *Campbell*, 1793, M. 1648, where a settled account with a docquet setting forth the transaction for which the bill was granted, coupled with production of the bill unretired was held to afford satisfying evidence that the debt was still unpaid.

[4] 1830, 8 S. 638.

[5] *Clarkson's Trustees* v. *Gibson*, 8th June 1820, F. C.

to the raising of the action, it was held that though the bill was related in the summons, the action was founded on the contract, and therefore the sexennial prescription did not apply.[1] The inference to which these cases seem to point is, that whether the pursuer sue upon the bill or upon the debt contained in the bill, he will do well to refer to the bill in his summons; and this deduction is borne out by what happened in the recent case of *Milne's Trustees* v. *Ormiston's Trustees*.[2] There the pursuers raised an action for repayment of a debt. But it was clear from the condescendence and pleas-in-law that their case was one of holders of a promissory-note (which the defenders alleged was prescribed) seeking to recover a balance of the contents of the note as onerous holders for value. When, therefore, the defenders pleaded that the grounds of action were not competently stated,[3] the Lord Ordinary (Stormonth Darling) allowed the pursuers to amend their summons, in terms of the Court of Session Act 1868, § 29, by inserting in the summons a reference to the note. In the Inner House, Lord Justice-Clerk Kingsburgh and Lord Trayner held that the summons was now in the form applicable to a suit upon a bill or promissory-note, and must be dealt with as such. They therefore decided in favour of the pursuers on the ground that the note had been preserved from prescription. Lord Young, on the other hand, held that the note was prescribed; but that the action being laid upon the debt, and the constitution and nonpayment of that debt being admitted, the pursuers must prevail. 'I am not prepared to hold,' said his Lordship, 'that the pursuers are prejudiced because they 'accepted the invitation of the Lord Ordinary to amend their 'summons. That is not an amendment at all.' Lord Rutherfurd Clark, while disposed to think that the note might still be sued on as a document of debt, concurred with Lord Young

[1] *Hunter* v. *Thomson*, 1843, 5 D. 1285.

[2] 1893, 30 S. L. R. 552; 20 R. 523; see *infra*, pp. 166-7.

[3] See 13 and 14 Vict., c. 36, Schedule A, No. 1.

in finding that the action was laid upon the debt, that the debt was admitted, and therefore that the defenders were bound to pay. 'I do not think I am precluded,' added his Lordship, 'from giving decree on account of the amendment of the 'summons. The original grounds of action remain, and are 'not in my opinion affected by the amendment.'

The sexennial prescription does not operate upon the claim of one who has signed an accommodation bill for another against that other;[1] nor upon any claim of relief, *e.g.* that of the acceptor against the drawer;[2] the exclusion of such claims from the scope of the statute resting on the principle that such actions are founded on the debt and not on the bill.

Is prescription barred by action raised within the six years?

The terms of the statute are that 'no bill of exchange shall 'be of force or effectual to produce any diligence in Scotland 'unless such diligence shall be raised and executed, or action 'commenced thereon within the space of six years' from the term at which the sums in the said bills become exigible. It will be observed that here is no word of 'interruption,' no syllable as to 'preserving the bill from prescription.' The plain meaning of the enactment undoubtedly seems to be that 'the promissory-note loses its virtue and force by too long 'keeping after the lapse of six years, and is thereafter not to 'have any force or effect unless diligence upon it has been 'raised and executed or action commenced upon it within the 'six years;' but 'that if action is commenced or diligence 'used within the six years, the expiry of these six years shall 'not interfere with the action so commenced or diligence so 'used. The action or diligence is alive and you may pro-'ceed with it' (p. Lord Young).[3] There is, however, a long train of decisions to the effect that where an action has been commenced or diligence done upon a bill within six years of its maturity, such action or diligence altogether excludes the

[1] *Jolly* v. *M'Neill*, 1829, 7 S. 666.

[2] *Ralston* v. *Lamond*, 1792, M. 1533.

[3] *Milne's Trustees* v. *Ormiston's Trustees*, 1893, 30 S. L. R. 552; 20 R. 523.

prescription, and keeps the bill alive as a document of debt and as a ground of *other* actions raised after the expiry of the sexennium. In *Milne's Trustees*[1] Lord Rutherfurd Clark also expressed grave doubts whether that view of the law was right, and thought the question might be taken up by the Court upon a fitting occasion. But Lord Justice-Clerk Kingsburgh and Lord Trayner held that the question was no longer an open one, having been decided 'in a considerable number 'of cases, varying almost as considerably in the peculiarity of 'their circumstances,' and accordingly found that the statutory defence must be repelled, since an action had been admittedly commenced and decree taken upon the bill in question within the six years.

The decisions say yes.

If at some future date the Court reopens the matter, and pronounces in favour of a strict interpretation of the plain words of the statute, its decision will differ from the judgment of Lord Justice-Clerk Hope in *Cullen* v. *Smeal*,[2] referred to by Lord Young, in respect that it will be directly contrary to many unequivocal decisions and expressions of opinion, while Lord Justice-Clerk Hope was at great pains to show that the view he so clearly expounded was in no sense opposed to the authority of previous cases. Thus in *M'Lachlan* v. *Henderson*,[3] it was held that diligence saved a bill from prescription 'so 'as to make it capable of being the foundation of an action 'raised after the six years;' in *Denovan* v. *Cairns*,[4] Lord Fullerton said, 'Here action has been raised within the six 'years, which the Act says is sufficient to interrupt prescrip-'tion;' and in *Roy* v. *Campbell*,[5] Lord-President Boyle held the plea of prescription to be inapplicable, because 'we have a 'judgment on the bill within the six years, and this action 'might have been brought at any time within the forty years.' In *Paxton* v. *Forster*[6] judicial procedure directed within the six

[1] 1893, 30 S. L. R. 552; 20 R. 523.
[2] 1853, 15 D. 868, *supra*, p.
[3] 1831, 9 S. 753.
[4] 1845, 7 D. 378.
[5] 1850, 12 D. 1028.
[6] 1842, 4 D. 1515.

years against two persons who were both next of kin and heirs-portioners of a deceased granter of a bill was held to prevent prescription in favour of other persons who, though heirs-portioners, were not next of kin of the deceased; though there it is to be noted that 'the proceedings at the meeting after the 'funeral' (whereby the heritable and moveable estates of the deceased were massed together) were also taken into account. The principle, however, that decree taken against one co-obligant within the sexennium precludes the other co-obligants from pleading the prescription after the sexennium, could not be more clearly asserted than it is in *Gordon* v. *Bogle*.[1]

The production of a promissory-note in a multiplepoinding as a ground of claim has been held tantamount to action,[2] and such a production in a multiplepoinding raised for distributing the effects of one member of a copartnery will bar one who turns out after the six years to be another member of the copartnery from pleading prescription.[3] The production of a bill with registered protests in a process of ranking and sale within the six years is equally efficacious to preclude prescription,[4] and so is the statutory production of a bill in a sequestration, though the sequestration be afterwards recalled.[5] Where, in the course of a trust for creditors a debt due on a bill had been acknowledged, by being narrated in the trust-deed, and generally recognised in the correspondence of the truster, the minutes of the creditors, and the deed of conveyance to the truster's heir, the plea of prescription was held to be barred as against a demand for payment of the debt.[6] The entering of a debtor into a special submission as to the bill in question also bars prescription.[7] From the analogy of the vicennial prescription,[8] Mr. Bell

[1] 1784, M. 11, 127. See also *Milne's Trustees*, 1893, 20 R. 523.

[2] *Lindsay* v. *Earl of Buchan*, 1854, 16 D. 600.

[3] *National Bank* v. *Hope*, 1837, 16 S. 177.

[4] *Douglas, Heron & Co.* v. *Richardson*, 1784, M. 11, 127.

[5] *Crawford's Trustees* v. *Haig*, 1827. 5 S. 705.

[6] *Ettles* v. *Robertson*, 1833, 11 S. 397.

[7] *Vans* v. *Murray*, 14th June 1816, F. C.

[8] *Wright* v. *Wright*, 1717, M. 11, 268.

infers that a suspension of a threatened charge would not suffice to interrupt prescription. But the production of a bill in a process of suspension, and its being founded on in compensation, have been held equivalent to such judicial action as will interrupt.[1] A charge given upon a bill, but not followed up by further diligence within the six years, was found sufficient to interrupt prescription, and keep the bill alive so as to be a foundation of new diligence after the six years.[2]

There must be diligence or action to exclude prescription.

But nothing short of diligence done or action raised upon a bill—nothing short, that is to say, of the preferring of a claim in a process in which legal effect can be given to it[3]—will suffice to exclude the operation of the prescription. The summons must be completely and formally executed before action can be held as commenced,[4] and it must libel the bill specially.[5] No mere admission of the debt within the six years will keep the bill alive. The mere protesting a bill and registering the protest will not constitute an interruption,[7] any more than the consenting of creditors to a private trust-deed granted by the debtor for their behoof,[8] or the entering of the debtor into a general submission of his debts,[9] or the emitting by the creditor of an affidavit affirming the verity of the debt in a private composition contract.[10] Even where, in a private trust, the creditor transmitted a statement of his claim on a bill to the agents of a debtor, prescription was held not to have been interrupted.[11] Where a party obtained a decree in absence against a minor as heir of his father on a bill overdue more than six years, and deponed to the verity of the debt in a process of sale of the minor's estate, which he purchased,

[1] *Ross* v. *Robertson*, 1855, 17 D. 1144.

[2] *Fraser* v. *Urquhart*, 1831, 9 S. 723.

[3] *National Bank* v. *Hope*, 1837, 16 S. 177, p. Lord Glenlee.

[4] *Baillie* v. *Doig*, 1790, M. 11, 286.

[5] *Douglas, Heron & Co.* v. *Richardson*, 1784, M. 11, 127. See *Arbuthnot* v. *Douglas*, 1795, M. 11, 133.

[6] *Easton* v. *Hinshaw*, 1873, 1 R. 23.

[7] *Scott* v. *Brown*, 1828, 7 S. 192.

[8] *Blair* v. *Horn*, 1858, 21 D. 45.

[9] *Gardon* v. *Rigg*, 1743, Kilk. Prescr. 11.

[10] *Watson* v. *Auchincloss*, 1822, 1 S. 371.

[11] *Ewing* v. *Cumine*, 1835, 14 S. 1.

retaining the amount of the bill out of the price, it was held that, when called on by the trustee on the sequestrated estate of the minor (now major), he was bound to repeat, and that prescription was not obviated though the minor's curators had taken credit for the sum so retained.[1] Where, within the six years, the creditor's agent notified claims, including one on a bill, to the agent for the trust on the debtor's estate in Scotland, and where, in addition, a process had been raised in the King's Bench which it was alleged saved those claims from the statute of limitations, the bill was nevertheless held to have suffered prescription.[2] Where the drawer of a bill which was duly accepted discounted it at the bank, and on its becoming due retired it and took a special receipt to that effect on the back of the bill, the receipt was held not to prevent the bill suffering prescription.[3] The taking out of a *fugae* warrant against the debtor on a bill will probably not interrupt the sexennial prescription, nor will the fact that during the six years, and long after it, the debtor has been an outlaw.[4]

Debtor's writ.

Where the operation of the prescription is not excluded, the constitution and the resting-owing of the debt contained in the bill must be proved by the writ or the oath of the debtor. A writ acknowledging the subsistence of the debt granted within the six years is valueless as a proof of resting-owing,[5] unless it founds a distinct and separate obligation.[6] That is the main principle with regard to the date of the writing by which prescription is sought to be elided (though in the case of *Lindsay* v. *Moffat*[7] the Court gave effect to a writ of the debtor dated on the last day of the prescriptive term). Thus, in a proof of the debt in an action on a prescribed bill, the pursuers relied, *inter alia*, upon a trust-deed and a letter of

[1] *M'Nicol* v. *M'Niell*, 1821, 1 S. 166.

[2] *Hunter* v. *Duff*, 1831, 9 S. 703; 1832, 6 W. & S. 206.

[3] *Buchanan* v. *Macdonald*, 1840, 2 D. 1444.

[4] *Brodie* v. *Sheddan*, 20th Feb. 1821, F. C.

[5] *Buchan* v. *Barclay*, 1787, M. 11, 128.

[6] *Russell* v. *Fairie*, 1792, M. 11, 130; *M'Tavish* v. *Lady Saltoun*, 1825, 3 S. 472.

[7] 1797, M. 11, 137.

the alleged debtor, both dated within the sexennium. It was held that the pursuer had failed in his statutory proof, inasmuch as these writings did not amount to a reconstitution of the debt, and did not substitute a new obligation for an old one, but left the debt standing upon the old document.[1]

All proof, moreover, antecedent to or contemporary with the bill must be independent of it, and not innovated or extinguished by the bill.[2] On the other hand, letters of the debtor after the six years, admitting the constitution of the debt, are sufficient proof of the constitution,[3] and where the granter of a promissory-note marked payments of interest upon the back of it seven years after its date, and made entries of similar payments in the cash-book he kept as factor for the creditor's trustees, these writings were held to have established the debt.[4] Such markings, however, within the six years prove nothing, for during that period the bill neither stands in need of, nor can be strengthened by, any such acknowledgments;[5] and mere entries in a debtor's pass-books of money received, such pass-books being of quite a different nature from ordinary account-books, and never having been out of the debtor's possession, have been held insufficient to establish constitution and resting-owing.[6]

The writing need not be probative, nor need it disclose the specific value given for the bill,[7] but it must be distinctly and specifically applicable to the debt in question,[8] though the writ will be relevant, even though not expressly referring to the debt, if in the circumstances it is capable of being construed as referring to it.[9] In *Horsburgh* v. *Bethune*[10] the writ

[1] *Bank of Scotland* v. *Taylor's Trustees*, 1859, 21 D. 1004.

[2] *Blake* v. *Turner*, 1860, 23 D. 15.

[3] *Macdonald* v. *Crawford*, 1834, 12 S. 533.

[4] *Drummond* v. *Lees*, 1880, 7 R. 452.

[5] *Allan* v. *Ormiston*, 1817, Hume, 477.

[6] *Storeys* v. *Paxton*, 1878, 6 R. 293.

[7] *M'Gregor* v. *M'Gregor*, 1860, 22 D. 1264.

[8] *Bank of Scotland* v. *Taylor's Trustees*, 1859, 21 D. 1004.

[9] *Wood* v. *Howden*, 1843, 5 D. 507.

[10] 13th Feb. 1811 F. C.

of the debtor's factor in the factory books was held not equivalent to writ of the debtor, and it was observed from the bench that 'all markings made beyond the six years, not by the 'debtor himself, but by another person, even the factor of the 'debtor, and far less the creditor himself, are of no avail in 'stopping prescription.' But more recent decisions gravely impugn the authority of this case. Entries of payments in the debtor's books made by his clerk have been construed as the debtor's own writ;[1] a receipt by a creditor found in his debtor's repositories has been held, under the circumstances, to be writ of the debtor;[2] and in a proof of the resting-owing of a debt in a prescribed bill, where the creditor produced a letter written to him by one of the two acceptors, bearing to be an answer to a letter from the creditor to the other acceptor, it was held competent to read the creditor's letter in explanation of the debtor's.[3] Letters written by the factor or agent of a trust-estate, and markings by him of payments of interest on the back of a bill after the years of prescription, were held to establish the debt in the bill against the trustees.[4] During the currency of the prescriptive period the debtor in a bill died, and his sister was appointed executrix. Before the expiry of the period, her agent made payments to account of interest and capital. After the lapse of the sexennium, her agent wrote to the creditor in the bill acknowledging the balance of debt due. In the circumstances, the writ of the agent was held to be binding on his constituent.[5]

It makes no difference, in proving a debt by the debtor's writ or oath, whether value was received for the bill by the defender himself or by his friend.[6] It is enough if value have

[1] *Black* v. *Shand's Creditors*, 1823, 2 S. 118.

[2] *Wood* v. *Howden*, 1843, 5 D. 507.

[3] *Rennie* v. *Urquhart*, 1880, 7 R. 1030.

[4] *Campbell* v. *Ballantyne*, 1839, 1 D. 1061.

[5] *M'Gregor* v. *M'Gregor*, 1860, 22 D. 1264.

[6] *M'Neil* v. *Blair*, 1825, 3 S. 319, p. Lord Pitmilly.

been received by one of the obligants on the bill.[1] But where there are several co-obligants, a written acknowledgment of the debt by some of their number (whether within the sexennium or not) will not be binding against the rest of the acceptors;[2] and the oath of one co-obligant admitting constitution and resting-owing, will prove the debt only against himself and not against the others.[3] When the six years are out the bill ceases to be *unum quid*, and no longer possesses the characteristics of a bill. The oath of trustees under a trust-deed of settlement of a deceased granter of a bill will be sufficient, if affirmative, to prove resting-owing of the debt contained in the bill: but if their oath be negative of resting-owing, Lord Alloway thought that reference to the oath of the heir when he came of age would not be precluded by the previous reference.[4]

After six years a bill no longer *unum quid*.

In dealing with the debtor's oath, we observe once more the two conflicting tendencies: one to abide by the strict letter of the statute, and to assoilzie a defender though he cannot specify the precise time or mode of payment,[5] the other to hold that a defender is not entitled to get off with a mere *nihil novi*,[6] and to forget that the question is, not whether the defender has paid the debt, but, whether the pursuer has proved constitution and subsistence in the statutory manner. As examples of the latter tendency, we may note *Black* v. *Black*,[7] where a joint-acceptor of a prescribed bill deponed on oath that he had not paid it, but had been told by the co-acceptor that *he* had paid it. This deposition was held affirmative of resting-owing, because the debtor had assigned only one reason for thinking the debt paid, and that reason not a suffi-

Debtor's oath.

[1] *Boyd* v. *Fraser*, 1853, 15 D. 342. See *Laidlaw* v. *Hamilton*, 1826, 4 S. 644; *Wilson* v. *Strang*, 1830, 8 S. 625.

[2] *Allan* v. *Ormiston*, 1817, Hume, 477.

[3] *Houston* v. *Yuill*, 1822, 1 S. 449.

[4] *Murray* v. *Laurie's Trustees*, 1827, 5 S. 484.

[5] *Fyfe* v. *Carfrae*, 1841, 4 D. 152.

[6] *Stewart* v. *Stewart*, 1823, 2 S. 483.

[7] 1838, 16 S. 1220.

cient one. Again, in *Paul* v. *Allison*,[1] Lord Medwyn laid down that after the debtor has proved the constitution of the debt, it is not enough for him to say, I know that it was paid. Lord Meadowbank, however, threw grave doubts on this view; and without venturing wholly to reject Lord Moncreiff's *dictum* that 'when in a reference to oath the party admits the 'constitution of the debt, the pursuer is not bound to take 'from him that the debt has been paid, but is entitled to have 'the facts sifted,' we may hold that the decision in *Stirling* v. *Henderson*,[2] where the debtor's heir and representative deponing that he did not know whether his ancestor had paid the debt or not, his oath was held not to prove resting-owing, —or a decision such as that in *Robertson* v. *Thomson*,[3] where the debtor's deposition that he had paid the balance of a prescribed bill sued for to the eldest son of a family, of which the mother and younger children stood in right of the bill, or to someone sent by him, without taking a receipt, seeing the authority of the payee, or accounting for it to the true creditor, was held to be negative of resting-owing—is much more in harmony with the provisions of the statute.

Judicial admissions.

With regard to the place of judicial admissions in a proof as equivalent to writ or oath of party, we need only refer again to the judgments of Lord Fullerton and Lord Jeffrey in *Darnley* v. *Kirkwood*,[4] and to the remarks of Lord Justice-Clerk Hope in *Noble* v. *Scott*,[5] where it is laid down that the admission founded on, whether called the writ of party or not, must be clear and distinct, and that a statement made to show payment must not be taken as an admission that the debt is due.

Extrinsic quality.

The quality of the debtor's oath has been held to be extrinsic, and the oath, therefore, affirmative of resting-owing, where the defender deponed that the debt had been ex-

[1] 1841, 3 D. 874.
[2] 11th March 1817, F. C.
[3] 1830, 8 S. 810.
[4] 1845, 7 D. 595; *supra*, p. 152.
[5] 1843, 5 D. 723.

tinguished by certain transactions in land;[1] where he deponed that the debt had been extinguished by a bond which he had subsequently granted, and which made no mention of prior claims or of the note in question;[2] and where the defender denied resting-owing on the ground that he had assigned his goods to creditors according to the law of England;—where, in fact, his oath only amounted to the expression of his opinion that the clearing of all his debts had resulted from a separate transaction.[3] Where the debtor on reference admitted the constitution of the debt, but alleged that after paying interest for some years and then offering repayment of the principal, the pursuer told him he did not want it, and that he was to keep it for his own use, the oath was held affirmative of resting-owing, apparently on the somewhat dubious ground that an *ex post facto* arrangement for discharging the debtor otherwise than by payment is necessarily extrinsic to the debtor's oath.[4] Compensation is almost always extrinsic[5] (despite the decision of a majority of the Court in *Fraser* v. *Fraser*,[6]) and the quality was also found extrinsic where the defender averred that the pursuer had acceded to a composition contract.[7] Similarly, in *Robertson* v. *Clarkson*,[8] where a party, sued on a prescribed bill, granted in payment of a quantity of wine, offered to depone that the wine had turned out unfit for use, and that the seller had admitted this, and had promised not to exact the price, it was held that this deposition was extrinsic, being equivalent to an allegation of compensation. In a case in which the onerosity of a bill was referred by the defender to the pursuer's oath, the pursuer deponed that the consideration for which the bill had been granted

[1] *Stewart* v. *Robertson*, 1852, 15 D. 12.

[2] *Williamson* v. *Peacock*, 11th Dec. 1810, F. C.

[3] *Stevenson* v. *Stevenson*, 1838, 16 S. 1088.

[4] *Balfour* v. *Simpson*, 1873, 11 M. 604.

[5] *Macdonald* v. *Crawford*, 1834, 12 S. 533.

[6] 27th June 1809, F. C.

[7] *Brown* v. *M'Intyre*, 1828, 6 S. 1022.

[8] 1784, M. 13, 244. Cf. *Trotter* v. *Clark*, *supra*, p. 149.

was in part payment of a debt, and in part payment of a sum which the acceptor had promised him if he would take back to live with him his wife from whom he had been divorced, and in payment of the expenses in connection with the action of divorce. The oath was held to be negative of onerosity (except as regards the direct debt), on the ground that the alleged consideration being extrinsic, and the acceptor being in no wise liable for the expenses of the divorce, there was no consideration.[1]

Intrinsic quality.

On the other hand, where, in a like reference, the pursuer deponed that the bill was handed to him by the drawer in order to get it negotiated, but that, he having failed in this, the drawer desired him to keep it, as he was due him money, and where the pursuer farther deponed that he had previously lent the drawer £50, which was still unpaid, the Court held that this adjection to his deposition was not extrinsic, and that his oath was affirmative of onerosity.[2] Where the acceptor of a bill, who was sued for payment after the six years, qualified his admission of the acceptance on record by the statement that he had accepted the bill only upon the understanding that his obligation should be extinguished upon such and such conditions, which conditions had been purified, the qualification was found intrinsic, and the oath negative of the reference.[3] In like manner, the quality was held intrinsic, and the pursuer's case not proved, where the debtor deponed that he had accepted certain bills sued on, but had given them by mistake for receipts for money advanced to him on account of a son of the drawer, to whom he had remitted goods;[4] where the suspender of a charge admitted that he had granted a promissory-note which had prescribed, and that he had not paid it, but added that the creditor had expressly stated to him, and that

[1] *Graham* v. *Kennedy*, 1860, 22 D. 560.

[2] *Gordon* v. *Pratt*, 1860, 22 D. 903.

[3] *Galloway* v. *Moffat*, 1845, 7 D. 1088.

[4] *Agnew* v. *Macrae*, 1782, M. 13, 219.

he (the suspender) understood, that it was not to constitute a debt against him;[1] and where the granter of a promissory-note deponed that he had signed it, had given it to a third party with a view to his discounting it, and with the money retiring another bill of the granter's, and did not know that it had been discounted.[2]

§ 40 of the Act of 1772, c. 72, enacts that 'the years of the 'minority of the creditors in such notes or bills shall not be 'computed in the said six years.' Where owing to the minority of the creditor's representative prescription did not run, it was held that nothing else, such as regular payment of rent subsequent to the date of the bill, or absence of correspondence, raised a presumption of payment.[3] The exception of minority is available to all the indorsees, but it is only the minority of an actual creditor on the bill that can be pleaded. Thus the minority of the beneficiaries under a trust cannot be pleaded by the trustees who are the true creditors on a bill.[4] Minority.

[1] *Baird* v. *Little's Trustees*, 1827, 5 S. 820.

[2] *Drummond* v. *Crichton*, 1848, 10 D. 340.

[3] *Patrick* v. *Watt*, 1859, 21 D. 637.

[4] *M'Neil* v. *Blair*, 1823, 2 S. 174.

CHAPTER XIV

OF THE SEPTENNIAL LIMITATION

§ 1. THE LIMITATION OF CAUTIONARY OBLIGATIONS

(Ersk., 3. 7. 22. 24.) (Bell, *Prin.*, §§ 600-604.)
(Bell, *Comm.* i. 374.) (More *apud* Stair, Note P., i. pp. cxv.-cxviii.)

Act 1695, c. 5.

The Act 1695, c. 5, entituled 'Act anent Principals and 'Cautioners,' provides that 'considering the great hurt and 'prejudice that hath befallen many persons and families, and 'oft-times to their utter ruin and undoing, by men's facility to 'engage as cautioners for others, who afterwards failing have 'left a growing burden on their cautioners without relief; there-'fore, and for remedy thereof, his Majesty, with advice foresaid, 'statutes and ordains that no man binding and engaging for 'hereafter, for and with another, conjunctly and severally, in 'any bonds or contracts for sums of money, shall be bound for 'the said sums for longer than seven years after the date of 'the bond, but that from and after the said seven years, the 'said cautioner shall be *co ipso* free of his caution: and that 'whoever is bound for another, either as express cautioner or 'as principal, or as co-principal, shall be understood to be a 'cautioner to have the benefit of this Act: providing that he 'have either clause of relief in the bond, or a bond of relief 'apart, intimate personally to the creditor at his receiving of 'the bond, without prejudice always to the true principals 'being found in the whole contents of the bond or contract: 'as also of the said cautioners being still bound, conform to 'the terms of the bond, within the said seven years, as before 'the making of this Act: as, also, providing that what legal

'diligence, by Inhibition, Horning, Arrestment, Adjudication, 'or any other way, shall be done within the seven years, by 'creditors against their cautioners for what fell due in that 'time, shall stand good, and have its course and effect after the 'expiry of the seven years, as if this Act had not been made.'

Obligation extinguished after seven years.

The effect of this enactment is to operate a total extinction of the cautioner's obligation after the expiry of the seven years, and a new obligation is absolutely necessary after that period to impose any liability upon the cautioner. In 1874 a heritable securities company borrowed a sum from the pursuer, and certain of its shareholders became cautioners for the principal and interest. In 1884 the agent of the company wrote to the lenders asking for a reduction of the rate of interest in the loan, stating: 'the loan is farther secured by 'the personal obligation for its repayment given at the date 'of the advance by the shareholders mentioned in the bond.' It appeared that this letter was not written on any special instructions, but was brought before the board (on which were some of the above mentioned shareholders) in ordinary course, and that no one concerned had had the 1695 Act in view. The company went into liquidation in 1888, and the lenders sought to obtain repayment from the persons mentioned in the bond. It was held that their obligation ceased absolutely in 1881, and that the letter of 1884 did not constitute a new obligation.[1] After the lapse of the seven years a cautioner paid the principal sum to the creditor, and next day demanded repetition on the ground that he had paid through mistaking the time, and had not really been liable. The defender pleaded that the debt was due *jure naturali*. But the Court ordered repetition, on the ground that payment had been made *sine causâ*, and that after the seven years there was no obligation natural or civil upon the cautioner;[2] as strong a case as could be imagined. The Act, then, unlike most of the statutes

[1] *Stocks* v. *M'Lagan*, 1890, 17 R. 1122.
[2] *Carrick* v. *Carse*, 1778, M. 2931.

establishing the shorter prescriptions, does not merely deal with the mode of proving, or the legal means of enforcing an obligation. It directly affects the quality of the contract, and entitles the party to say, after seven years, I am free.[1] The only thing that can deprive a cautioner of the benefit of the statute is diligence done,[2] or action raised[3] (Mr. Bell says decree obtained)[4] against the cautioner within seven years; and the diligence will not cover more than the principal and seven years' interest. Mere citation will apparently not suffice to bar the plea of the limitation; nor will payment of interest by a cautioner after the seven years have run have any effect to continue his obligation.[5]

What is a cautionary obligation?

With regard to what constitutes a cautionary obligation affected by the statute, it has long been held that the clause beginning 'whoever is bound for another' is not to be interpreted as a restriction of the liberty expressly conferred upon 'the said cautioner' 'binding for and with another,' after seven years, in the preceding clause, imposing upon him the necessity of showing a clause of relief, or a separate bond of relief, as a condition of his reaping the benefit of the enactment; but that the proviso as to the clause or bond of relief applies only to one bound as principal or co-principal. This interpretation was distinctly asserted by the Court of Session in *Douglas, Heron & Co.* v. *Riddick*,[6] and emphatically supported by the House of Lords in *Yuille* v. *Scott*.[7] Where certain shareholders of a company bound themselves as individuals, 'and by way of corroborative guarantee,' for the repayment of a sum of money borrowed by the company, they were held to be cautioners, and therefore entitled to the benefit of the Act;[8]

[1] *Alexander* v. *Badenach*, 1843, 6 D. 322.

[2] *Reid* v. *Maxwell*, 1780, M. 11,043.

[3] *Clark* v. *Stuart*, 1779, M. 11,043.

[4] Prin. § 603; *Stuart* v. *Hill*, 1712, M. 11, 039.

[5] *Yuille* v. *Scott*, 1827, 6 S. 137; 1831, 5 W. & S. 436. But a cautioner may be barred *personali exceptione* from pleading the limitation. See *M'Kerchar* v. *Anderson*, 17th June 1893, Scots Law Times, vol. i. p. 93.

[6] 1792, M. 11, 032.

[7] 5 W. & S. 436.

[8] *Stocks* v. *Maclagan*, 1890, 17 R. 1122.

and where a party was bound as 'cautioner, surety, and full 'debtor with and for' the principal in a bond for payment of a sum of money the Act was held to apply.[1] But the Act was found not applicable to a bond in which two persons were bound as co-obligants with no clause of relief or back bond, though one was known to be only a cautioner,[2] nor to a letter written by a party on the same day as a bond for £2000 was granted, in which the writer, proceeding on a narrative of the granting of the bond, 'guaranteed' payment of the sum contained in the bond to the lenders.[3] In the latter case Lord Chancellor Cottenham drew a distinction between 'caution' which means an undertaking that others shall perform what they have contracted to do, and 'guarantee' as used in the defender's letter, in a sense amounting to a distinct contract to pay the sum due.

Intimation of bond of relief.

Where there is a separate bond of relief the requirement of the Act as to intimation is strictly enforced. For that personal intimation mere private knowledge on the part of the creditor will not be admitted as a substitute.[4] The intimation need not perhaps be notarial or judicial, but it must be distinctly proved by writing, and parole proof is inadmissible. Three obligants were jointly and severally bound in a bond. The creditor's agent (not acting herein, however, in that capacity) framed letters of relief by the true principal debtor to each of his co-obligants. In the absence of proof *scripto* that these letters of relief had been intimated to the creditor, the Act was held not to apply.[5] But where a creditor with his own hand wrote and signed as a witness a bond of relief granted by one co-obligant on a bond to the other of even date with the original bond, this was held equivalent to the statutory intimation.[6]

[1] *Monteith* v. *Pattison*, 1841, 4 D. 161.

[2] *Smith* v. *Ogilvies*, 1821, 1 S. 152; 1825, 1 W. & S. 315.

[3] *Wilson* v. *Tait*, 1836, 15 S. 221; 1840, 1 Rob. App. 137.

[4] *Bell* v. *Herdman*, 1727, M. 11, 039.

[5] *Drysdale* v. *Johnstone*, 1839, 1 D. 409.

[6] *M'Rankin* v. *Schaw*, 1714, M. 11, 034.

Certain cautionary obligations not affected by the Act.

There are, however, certain kinds of cautionary obligations which are not affected by the statute. Of these the most important are those in which the term of payment for which caution is given is postponed beyond seven years from the date of the bond, or in which its arrival depends upon a condition not purified within seven years. That the statute really applies to all cautionary obligations without restriction, is, indeed, a highly plausible interpretation of its terms; but within fifteen years of the passing of the statute it was rejected in favour of the stricter construction which holds that only those obligations are extinguished by the limitation which are prestable within the septennium. In *Balvaird* v. *Watson*,[1] it was decided that a cautionary obligation for an annual payment does not fall within the statute, for so long as the payment is punctually made, no diligence can be done against the cautioner, and every year a new obligation arises. The same result was arrived at in *Borthwick* v. *Crawfurd*,[2] the case of a bond payable after the death of the creditor's wife who survived the seven years, and in *Millers* v. *Short*,[3] where the principal was not to be paid till a fixed term, viz. eight years after the date of the bond. These cases were carefully reviewed in *Molleson* v. *Hutchison*,[4] where a bond for borrowed money, dated in November 1881, bound the borrower to repay the principal at Whitsunday 1882, and contained an obligation by the borrower, and by certain other persons as cautioners, to pay at said term the interest then due, and interest half-yearly thereafter till repayment of the principal. Interest was duly paid till Martinmas 1890; and the action was brought for interest due subsequent to that date against one of the cautioners, who pleaded the statute. There was no difference of opinion among the judges that if the defender's cautionary obligation had been for principal as well as for interest, the Act would have applied; but the obligation being

Molleson v. *Hutchison.*

[1] 1709, M. 11, 005.
[2] 1715, M. 11, 008.
[3] 1762, M. 11, 027.
[4] 1892, 19 R. 581.

merely for payment of interest, the pursuer contended that the case was ruled by *Balvaird*,[1] and was therefore to be taken as outside the scope of the statute. A majority of seven judges held that as the interest sued for was not due till after seven years from the date of the bond, the cautionary obligation was not affected by the limitation; while the minority came to an opposite conclusion on the ground that the pursuer might have enforced payment of the principal with interest at any time within the *septennium*, Lord Trayner distinguishing the case from *Balvaird*, but at the same time indicating a disposition to disregard the cases, if need be, and to return to the plain language of the statute. On this latter point Lord M'Laren expressed himself emphatically in the opposite sense, holding that the series of cases beginning with *Balvaird* 'have passed into the common law, 'and are as much a part of the law of guarantee, or cautionary 'obligation, as the statute itself.' On the whole case, the same judge, with reference to the view of the minority of the Court, held it to be no answer against the pursuer's contention to say 'that in a state of facts which has not occurred the obligation 'might have been made the subject of a demand within the 'statutory period;' while Lord-President Robertson said, *inter alia*; 'The principle expressly laid down by the Court in *Bal-*'*vaird*, that every year *nata erat nova obligatio* supplies a rule 'which applies equally to this case as to that. The subsequent 'cases of *Borthwick*[2] & *Millers*[3] directly follow and confirm 'the rule thus established . . . The case of *Balvaird* seems to 'me completely to cover the present question, the only differ-'ence being that the liability there was to pay an annual sum 'in name of annuity, and here it is to pay an annual sum in 'name of interest. There as here there was a liability to pay 'such annual sum within the *septennium* as well as beyond it. '. . . What has been regarded as the criterion in the question 'whether the statute applies, is, I think, the liability of the 'cautioner and not the liability of the principal debtor.'

[1] 1709, M. 11, 005. [2] 1715, M. 11, 008. [3] 1762, M. 11, 027.

It is upon the same principle that the benefit of the limitation is withheld from cautioners *ad factum praestandum*,[1] or for the discharge of an office,[2] or under a marriage contract,[3] or in a composition contract,[4] or in a confirmation,[5] or in any sort of judicial proceeding, *e.g.*, a suspension.[6] Nor does the Act apply to cases where the debt is not liquid;[7] nor to engagements to pay, or see paid, a sum already lent;[8] nor to caution in a bond of relief,[9] or of corroboration,[10] or in a bill;[11] nor to a letter of credit, and probably not to a cash credit bond,[12] though that is certainly a cautionary obligation;[13] nor to an action of relief by one creditor against another.[14]

Minority. The Act contains no exception infavour of minors, the years of whose minority are consequently not to be deducted.[15]

§ 2. PRESCRIPTION OF CITATIONS.

Act 1669, c. 10. The Act 1669, c. 10, provides 'that all citations that shall be 'made use of for interruptions, whether in real or personal 'rights, be renewed every seven years; otherways to prescribe; 'except the parties be minors; in which case this Act is not to 'be extended against them during the years of their minority.' This enactment applies to citations used as interruptions of all prescriptions, whether long or short.[16]

[1] *Kincaid's Creditors* v. *Farquhar*, 1741, Elch. Cautioner, 11.

[2] *Bremner* v. *Campbell*, 1839, 1 D. 618; 1842, 1 Bell App. 280.

[3] *Stewart* v. *Campbell*, 1726, M. 11, 010.

[4] *Cuthbertson* v. *Lyon*, 1823, 2 S. 292.

[5] *Gallie* v. *Ross*, 1836, 14 S. 647.

[6] *M'Kinlay* v. *Ewing*, 1781, M. 2154.

[7] *Anderson* v. *Wood*, 1821, 1 S. 31.

[8] *Howison* v. *Howison*, 1784, M. 11, 030; *Caves* v. *Spence*, 1742, M. 11, 020.

[9] *Bruce* v. *Stein*, 1793, M. 11, 033.

[10] *Scot* v. *Rutherford*, 1715, M. 11,012.

[11] *Sharp* v. *Harvey*, 24th June 1808, M. App. Bill 22.

[12] *Alexander* v. *Badenach*, 1843, 6 D. 322.

[13] *Mackenzie* v. *Macartney*, 1831, 5 W. & S. 504.

[14] *Forbes* v. *Dunbar*, 1726, M. 11, 014.

[15] *Stewart* v. *Douglas of Cavers*, 1712, M. 11, 151.

[16] *Camerons* v. *Macdonald*, 1761. M. 11, 331. Ersk. *Inst.* 3. 7. 43.

CHAPTER XV

OF THE DECENNIAL PRESCRIPTION

(Stair, 2. 12. 34. Ersk. *Inst.* 3. 7. 25.)
(Bell, *Prin.*, § 635.)

Act 1696, c. 9.

The Act 1696, c. 9, entitled 'Act of Prescription anent Tutors 'and Curators accompts,' provides 'that all actions of compt 'and reckoning, competent to pupils and minors, against their 'tutors and curators, for making their accompts, not pursued 'and insisted in within the space of ten years after the majority 'of the said pupils and minors, or after their death, they dying 'in their minority, shall after that time prescribe for ever; and 'the saids tutors and curators, and their successors, shall be as 'fully exonerate and liberate, as if the saids pupils and minors, 'after their majority had fully and amply discharged the same; 'And declares that the contrary action at the instance of 'tutors and curators against their pupils and minors, shall 'prescribe in the same manner within ten years: declaring 'always that this prescription shall not run against minors.'

Extinguishes right of action.

The presumption afforded by the lapse of ten years is the prescriptive *praesumptio juris et de jure* which cannot be redargued. It may be pleaded by a curator who has neglected to make up inventories, and even by one who, after the years of prescription has given an extra judicial consent to afford information respecting the affairs of the curatory.[1]

[1] *Gowans* v. *Oswald*, 1831, 10 S. 144. See also *Mercer* v. *Irvine*, 1736, M. 10, 996; *Cunningham* v. *Curators*, 1727, M. 16, 338.

CHAPTER XVI

OF DECENNALIS ET TRIENNALIS POSSESSIO

(Ersk., 3. 7. 33, 34.)

Churchman's title presumed from possession.

The maxim *decennalis et triennalis possessio non tenetur docere de titulo* has been adopted into our system from the canon law out of favour to Churchmen, 'because their rights are more exposed 'to accidents than those of other men, through the frequent 'change of incumbents.'[1] Its effect is to make thirteen years' possession sufficient to support a churchman's right to any subject as part of his benefice, though he should produce no title in writing to it. The churchman's title is presumed from his possession; and he is entitled, in virtue of such possession, to appear, not only in a possessory, but also in a declaratory action. When a minister's right under the brocard has been judicially declared, a title of property is thereby constituted equivalent in its operation to a proper written title; but when not so fortified, being purely presumptive, it is liable to be elided by contrary proof. So that if the churchman's title be recovered, and it thence appear that he has possessed to a greater extent than the title warranted him, his right will be restricted within the bounds of the title so recovered.[2] The whole question was very fully and instructively discussed in *Cochrane* v. *Smith*[3] from the judgments in which the principles just set forth are mainly derived. In that case it was also decided that the right founded by the *dec. et trienn. possessio* is not only presumptive, but also temporary and dependent upon the continuance of possession; 'that as it springs into life by

[1] Ersk. 3. 7. 33.

[2] *Greig* v. *Duke of Queensberry*, 21 Nov. 1809, F. C.; *Bishop of Dunblane*, 1676, M. 7950; *Representatives of Rule*, 1708, M. 11, 002.

[3] 1859, 22 D. 252.

'possession, it dies when all possession has ceased. It was introduced to secure and defend possession, not to vindicate a 'right to a subject, the possession of which has been abandoned' (p. Lord Wood). Hence a minister claiming as part of his benefice a subject which had been undoubtedly possessed as such for more than thirteen years, about thirty years prior to the raising of the action, but which had subsequently been possessed by other parties claiming right upon a different title, can take no benefit from the rule. Incumbents are entitled to plead upon the possession of their predecessors in office.

It has been held that a precentor, not being an ecclesiastic, is not entitled to the benefit of the rule.[1]

[1] *Traill* v. *Dangerfield*, 1870, 8 M. 579.

CHAPTER XVII

OF THE VICENNIAL PRESCRIPTION

§ 1. CRIMES

Hume's doctrine.

On this subject it is unnecessary to do more than quote the words of Hume.

'In the close of all, the question may naturally be asked 'respecting the prosecutor's title, public or private,—Does it 'endure for ever, or is it, like most matters of civil claim, liable to 'be extinguished by length of time? Certainly such a defence is 'not good, if the offender, by absconding is himself the cause why 'the trial is not earlier; and if the prosecutor, by taking sentence 'of fugitation, has done all in his power to bring him to justice. 'In such circumstances William Dods was accordingly tried and 'condemned to die, on 2d October 1663, for the murder of 'Andrew Hardie, committed on 20th November 1640. But 'there is much to say on the side of the accused in the opposite 'case, where he has remained all along, for a series of many years, 'within the kingdom, accessible to justice, and has never been 'challenged, or called in question, for the matter now laid to his 'charge. The little benefit of an example in such circumstances; 'the natural decay of resentment, public and private, in the course 'of time; the anxiety endured by the culprit for so many years; 'the difficulty of establishing the whole circumstances of the fact; 'the possible, nay the probable loss of the pannel's evidence in 'exculpation; the obvious unfairness of the prosecutor's own 'conduct in delaying so long: All these considerations, plead 'powerfully in support of that equitable rule of the Roman law— 'recommended also by the general practice of nations in modern 'times—which gives the accused his *quietus* at the end of *twenty* 'years. Though not established in our older practice, this humane 'defence was accordingly, on mature deliberation, sustained in bar 'of trial, in the case of Callum Macgregor, who was indicted at 'the Lord-Advocate's instance, in Spring 1773, for a murder com- 'mitted in December 1747—no warrant having been executed '(although one had been taken out), nor precognition taken, nor 'libel raised against him all the while, though within the king-

'dom, and not absconding. The judgment was duly guarded: '"In respect it does not appear that any sentence of fugitation '"passed against the pannel, sustains the defence, and dismiss the '"indictment." We may conclude, that, if relevant against a 'charge of murder, that crime of which the memory lasts the 'longest, this defence will be no less effectual in the case of the 'less atrocious offences.'[1]

§ 2. RETOURS

(BELL, *Prin.*, § 2024.) (MORE *apud* STAIR, I., p. cclxxi.)

A vicennial prescription of retours was introduced by the Act 1617, c. 13. Act 1617, c. 13, which runs as follows:—

'Forasmuch as by Act of Parliament, made by his Majesty's 'most noble progenitour, King James the Fourth, of worthy 'memory, upon the 13th day of June 1494, it was statute and 'ordained, that all summonds of errour, or inordinate processe, be 'pursued within the space of three years after the determination 'of the inqueist, or service, the party being of lawful age, and 'within the realm, otherwise to prescribe, as in the said Act 'and statute at more length is contained: And because the true 'meaning and intention of the said Act was, that our Soveraigne 'Lord's lieges, being upon the said inquest and service, should not 'lye under the paine and danger of errour, after the space of three 'years, and no wayes to hurt or prejudge the righteous heir and 'nearest of kin, who, by the law of God and man, was to succeed 'in the right of blood and succession to their predecessours, and 'to their lands and heritages, *jure sanguinis*,—Therefore, our said 'Soveraigne Lord, with advice and consent of the Estates foresaid, 'statutes and ordains, that the said act of Parliament shall no 'wayes hurt nor prejudge the nearest of kin to seek reduction of 'the saids retours and service, to be passed and expede in time 'coming, and that within the space of *twenty years*, immediately 'following the date of the saids retours and services; and if the saids 'summonds of reduction be not intented, executed, and pursued, 'before the expiring of the saids twenty years, that the said action 'of reduction of the said retour and service, shall prescrive in the 'selfe, and no party to be heard thereafter to pursue the same re-'duction: And also declares, that hereafter it shall no wayes be 'lawful to pursue the persons of inquest for *wilful errour*, except

[1] Hume's *Commentaries on the Law of Scotland respecting Crimes*, vol. ii. p. 136.

'they be pursued therefor within the space of three years next 'after the date of the said retour and service: It is always 'declared, that these presents shall no wayes be prejudicial to 'whatsoever persons who have acquired rights of lands and heritages 'before the date hereof, *bonâ fide*, from persons already retoured 'thereto, in any time bygone; but the saids persons, who have '*bonâ fide* acquired, to brook their rights according to the law then 'standing.'

The prescription thus instituted applies to retours of heirs of provision as well as of heirs *jure sanguinis*,[1] and affects extract decrees of service, the modern equivalent of retours. It does not interfere with the common law right of an heir at any time to quarrel his own retour on the ground of minority or lesion,[2] but operates only on erroneous services where a remoter agnate has been retoured heir, to the prejudice of a nearer in line.

Relation of this statute to 1617, c. 12.

It has occasioned some difficulty to determine the question how this statute is to be reconciled with that immediately preceding it, viz. 1617, c. 12, the principle of which is, as we have seen, that there is no answer to a claim of property (apart from a competition of titles with the claimant), except the production of a statutory title clothed with possession for the prescriptive period.[3] If a retour alone can be reared up into a valid title to the party served, what becomes of the maxim *nulla sasina, nulla terra*? (For the view that the retour must be fortified by possession, though not altogether without support,[4] is almost certainly erroneous.)[5] And what, too, it may be asked, of the other maxim, *jus sanguinis numquam praescribitur*? The puzzle seems to be solved by Lord Chancellor Cottenham's lucid exposition of the law in *Neilson* v. *Cochrane's Representatives*.[6] The Lord Chancellor there pointed out that the vicennial prescription is that of a retour of a person

[1] *Campbell* v. *Campbell*, 1848, 10 D. 461.

[2] *Gray* v. *Fotheringham*, 1700, M. 10, 987.

[3] *Wallace* v. *Earl of Eglinton*, 1835, 13 S. 564.

[4] *Incorporation of Wrights* v. *Hutchieson*, 1794, Bell's Folio Cases, p. 7.

[5] Bell, Prin., § 2024; Bankton, 3. 5. 97.

[6] 1837, 15 S. 365; 1840. 1 Rob. App. 82.

as the proper heir, and that the Act only provides that a person served as heir shall not be disturbed in his right as heir after twenty years, by any action brought by another person *claiming only to be the true heir*. 'But the heir may be disturbed 'by any person who comes in with a stronger title than that 'of mere heirship. . . . The statute provides that, *quoad* the 'heirship, the service and retour of one party *quâ* heir, shall 'not be disputed by another party who merely comes in *quâ* 'heir.' As Lord Meadowbank pointed out in the Bargany case,[1] 'the positive prescription does not operate against the 'title to pursue of the claimant, but only in establishing the 'title of property of the person in possession; nor does the 'validity of the one imply the invalidity of the other; *jus* '*sanguinis* cannot be abandoned or lost *non utendo*; the vicen-'nial prescription only renders the verdict of propinquity in a 'retour a *res judicata*.' The object of the statute is, in short, 'to secure the service from all challenge on the ground of 'error, from whatever source that error, *quâ* error, arose.'[2] The prescription would probably not exclude a relevant and specific charge of fraud, 'though it might and must exclude all 'other reasons of reduction.'[3] But it will not free one retoured as heir from the obligation to denude in favour of a nearer heir who subsequently comes into existence.[4]

A retour *ex facie* invalid is, of course, worthless, and cannot be made valid by the mere lapse of time.[5] It was also laid down in the Bargany case, that the privilege of pleading the statute is purely personal to the heir retoured, and does not descend to his nearest heir; so that after the death of the retoured heir, the true heir may vindicate his right at any time.[6] But in *Neilson* v. *Cochrane's Representatives*,[7] and in

[1] *Fullarton* v. *Dalrymple*, 1798, 1 W. & S. Appendix II. p. 7.

[2] *Shedden* v. *Patrick*, 1852, 14 D. 721, p. Lord Fullerton.

[3] *Ibid.*

[4] *Mackinnon* v. *Macdonald*, 1765, M. 5279.

[5] *Fullarton* v. *Hamilton*, 1825, 1 W. & S. 410.

[6] *Ibid.*

[7] 1837, 15 S. 365; 1840, 1 Rob. App. 82.

Campbell v. *Campbell*,[1] it was held and assumed throughout, that the prescription could be pleaded by singular successors; and this view was affirmed in *Rocca* v. *Catto's Trustees*.[2]

Years of minority excepted.

Contrary to the general rule, it has been held that the statute implies an exception of the years of minority, though it does not expressly make any such exception.[3] This decision may perhaps be justified by the language of the statute of 1494 (repeated in the preamble to 1617, c. 13), to the effect that the party alleging hurt to himself by the retour, and pursuing a summons of error, must bring his action within three years, 'being of lawful age and within the realm.'

37 and 38 Vict. c. 94, § 13.

The Act 37 and 38 Vict. c. 94, § 9, provides for the vesting in heirs of a personal right to estates in land without service or other procedure, and in § 13 the same statute goes on to declare that, 'the right of any person to an estate in land by 'succession as heir, acquired after the commencement of this 'Act, may, at any time within twenty years of his infeftment 'as heir and his entering into possession of such estate, but 'not thereafter, be challenged by any one who would have 'been entitled to challenge the decree of service of such person 'had he expede a service according to the practice existing 'prior to this Act; and, in the absence of evidence to the con-'trary, the date of his infeftment shall, for the purpose of this 'limitation, be assumed to be the date of entering into posses-'sion; and such challenge may be made by an action to 'negative or set aside the alleged right of succession, or to 'reduce any title expede in virtue of such alleged right.' But by § 14, nothing in the Act is to prejudice or affect previously existing remedies of a person having lawful title and interest to prevent another from taking possession as heir, or to remove him, the interim possession being regulated as a question apart from title.

[1] 1848, 10 D. 461.
[2] 1876, 4 R. 70.
[3] *Gray* v. *Fotheringham*, 1700, M. 10, 987

§. 3. HOLOGRAPH WRITINGS.

(Ersk, *Inst.*, 3. 7. 26.)
(Bell, *Prin.*, §§ 590-592.)
(Bell, *Comm.* i. 346.)
(Dickson on Evidence §§ 421-432 [412-423].)
(More, *apud* Stair i. cclxx.)

Act 1669, c. 9.

The Act 1669, c. 9, 'Statutes and ordains, that holograph 'missive letters, and holograph bonds, and subscriptions in 'compt-books without witnesses, not being pursued for with- 'in twenty years, shall prescrive in all time thereafter, except 'the pursuer offer to prove, by the defender's oath, the verity 'of the saids holograph bonds and letters and subscriptions in 'the compt-books.'

Holograph writing good for nothing after twenty years.

A holograph writing founded on after the lapse of twenty years can prove no fact tending to establish an obligation, and is to be considered in every respect as good for nothing unless supported as the law directs. Such was the decision in the *Bank of Scotland* v. ——,[1] which settled the law as to the effect of the provision of the statute; and the small number of cases corroborating it is due to the fact that this view of the enactment has been rarely, if ever, called in question. The principle was reaffirmed in *Mowat* v. *Banks*,[2] where holograph letters acknowledging a debt were held in common with 'all 'holograph obligations whether more or less formal' to fall under the prescription. In order, then, to be struck at by the statute as evidence of an obligation, the holograph writing need not be a formal document. When the twenty years have elapsed, the *onus* is thrown on the pursuer of proving the verity of the bond or deed by writ or oath of the defender, and by verity is understood the genuineness of the whole document and not merely of the subscription. When the verity of the deed has been established in the statutory manner, the pursuer is not bound to prove resting-owing by the defender's writ or

[1] 1747, 5 Br. Sup. 748.
[2] 1856, 18 D. 1093.

oath; on the contrary, the holograph writing, once raised up, will be kept in force till it is extinguished by the long negative prescription or discharged, and the *onus* is transferred to the shoulders of the defender, who will have to prove the extinction of the obligation established by his oath.[1] Any statement made by the defender on oath as to resting-owing is extrinsic to the reference.[2] The prescription runs from the date of the document, even though the obligation it contains be future or contingent,[3] and does not affect documents used to instruct a defence.

The prescription excluded by action or diligence.

The raising of an action upon the writing within twenty years will preserve its probative character and exclude the operation of the statute, even though the document be not produced in Court during the process.[4] So probably will a plea of compensation founded on the debt within the twenty years.[5] Diligence done upon the document will have the same effect; merely registering the document, however, will not suffice, nor will a suspension by the debtor of a threatened charge.[6] It has never been decided whether payment of interest or the like *rei interventus* following upon the bond or deed will preserve it beyond the twenty years. There is no express authority in the statute for holding that it will. But Mr. More expresses an opinion in the affirmative[7] and supports it by many powerful arguments.

If the original obligant have died, the oath of his heir will be sufficient to establish the document.[8] But it must be an oath of knowledge, not of mere belief; though where an heir could not swear positively to the fact, but deponed that he could not have a doubt on the point, the Court held that the

[1] *Earl of Leven* v. *Arnot*, 1715, M. 10, 991; *Muir* v. *Cunningham*, 1695, 4 Br. Sup. 269.

[2] *Grant* v. *Anderson*, 1705, M. 13, 235.

[3] *Home* v. *Donaldson*, 1773, M. 10, 992.

[4] *Simpson* v. *Brown*, 1791, Bell's 8vo Ca. 380.

[5] Dickson, § 425 (416).

[6] *Wright* v. *Wright*, 1717, M. 11, 268.

[7] *Apud* Stair I. cclxxi.

[8] *Brown* v. *Crawford*, 1741, M 9417; *Walkingshaw* v. *Knapperny*, 1337, Elch. Prescr. 15.

proof demanded by the statute had been supplied.[1] The prescription is a privilege of party, and must be pleaded; so that where the authenticity of certain holograph writings had gone to issue, and a proof *pro ut de jure* had been led, it was held that the defender could not afterwards plead the statute.[2]

The Act expressly declares that the prescription 'shall not 'run against minors during the years of their minority.' Minority.

Neither the clause in the Act 1669, c. 9 (which comes before the clause introducing the vicennial prescription), regarding the prescription of actions, nor the Act 1685, c. 14, applies to an action raised on a holograph writing.[3]

[1] *Dalziel* v. *Lord Lindores*, 1784, M. 10, 994.

[2] *Wyse* v. *Wyse*, 1847, 9 D. 1405.

[3] *Stein* v. *Sands*, 1825, 4 S. 105.

CHAPTER XVIII

OF PRESCRIPTION IN RELATION TO INTERNATIONAL LAW

(Dickson on Evidence, §§ 529-542 [523-537].)
(Story, Conflict of Laws, §§ 576-583.)
(Guthrie *apud* Savigny, Note B, p. 267.)

Prescription of heritage.

It is well upon so controverted a topic to start with the indisputable proposition that prescription of heritable property must be regulated by the *lex rei sitae*—the law of the country where the heritable property is situated.

Upon attempting to advance farther, however, we are at once plunged into a sea of conflicting views. It is impossible, here, to do full justice to the arguments of the opposing schools. We can merely indicate what seem to us the conclusive considerations adduced by Dickson and Story.

Prescriptions affecting the remedy.

1. The first-class of prescriptions is that which affects merely the creditor's remedy, by limiting his action to a certain period of time, or by imposing on him, after that period has expired, a specified and restricted mode of proof. To this class belong *e.g.* the triennial and sexennial prescriptions. These, according to Story, belong *ad litis ordinationem* and not *ad litis decisionem.* The case of *Don* v. *Lippmann* [1] settled once for all with regard to such prescriptions that their application is governed by the law neither of the *locus contractus,* nor of the *locus solutionis,* nor yet by the law of the debtor's domicile, but by the law of the *forum* in which redress is sought. So where the acceptor of a bill drawn and accepted in France was sued upon it in the Scotch courts, it was held that the sexennial prescription

[1] 1837, 2 S. and M'L. 682, 723, 728; reversing C. of S., 1836, 14 S. 241.

applied, and that what in France would have sufficed to interrupt the French prescription of bills had no effect to bar the prescription, not being a valid interruption according to the law of Scotland. Lord Brougham, in his exposition of the law, referred to the cases of the *British Linen Company* v. *Drummond*[1] and *Williams* v. *Jones*[2] as having been decided in accordance with that principle, and pointed out that the contention that statutory limitations of the mode of proof are of the essence of the contract implies that a breach of the undertaking is in contemplation of the parties, than which nothing could be more contradictory to good faith.

There is much to be said for Mr. Guthrie's contention[3] that previously to that decision the Scotch courts went upon the principle that the law of the debtor's natural and permanent forum—*i.e.* the law of his domicile during the whole currency of the term of the limitation, and not the law of the forum in which the action happens to be brought, must regulate the application of prescription. But the authority of *Don* seems to be an insuperable obstacle in the way of any attempt to revert to the old rule, and it has been followed in subsequent cases.[4]

Prescriptions extinguishing the claim.

2. The second-class of prescriptions is that in which not only is the right of action extinguished or restricted, but the claim or title itself *ipso facto* perishes and becomes a nullity after the lapse of the prescribed period[5]—*e.g.* the long negative prescription. With regard to this class there has been no such clear exposition of the law. But Mr. Story[6] and Mr. Burge[7] agree in thinking the correct rule to be that if a party has resided in the *locus contractus* for such a time as by the law of that place would suffice to extinguish the obliga-

[1] 1830, 10 Barn. and Cress. 903; 1 Ross L. C. (Com.) 841.

[2] 1811, 13 East. 439.

[3] *Apud Savigny*, p. 269. See the cases there quoted.

[4] *Farrar* v. *Leith Banking Company*, 1839, 1 D. 936; *Robertson* v. *Burdekin*, 1843, 6 D. 17; *Strathern* v. *Masterman*, 1850, 12 D. 1087.

[5] Story, § 582.

[6] *Ibid.*

[7] 3 Comm. 883.

tion, his removal to another country where no such prescription exists will not revive the obligation. This view was taken by the Supreme Court of the United States in *Shelby* v. *Guy*;[1] it was not contradicted by Lord Brougham in *Don*,[2] and it was hinted at by Lord Chief-Justice Tindal in *Huber* v. *Steiner*.[3] On the other hand, if a party, after making a contract in country A, removes to country B, and there resides for a period long enough to extinguish the obligation according to the law of country B, if it had been the *locus contractus*, but not long enough to extinguish the obligation according to the law of country A, the party will still be liable if pursued in country A, the *locus contractus*, so long as according to its laws the debt is still subsisting.[4] 'It is impossible,' remarked Lord Gifford in the House of Lords, 'that by a person's removal to 'Russia or any other country where a different law prevails from 'that of Scotland, he can discharge himself from [his] debts; 'but he must, if he returns to that country, be liable to be 'sued, leaving it open to him to avail himself of any defence 'which the law of Scotland enables him to set up against 'these demands.'

Prescriptions entering into the contract.

3. In the third-class of prescriptions—viz., where the limitation enters into the contract, and is to be read as part of it—*e.g.* the septennial limitation of cautionary obligations, the rule is very simple. The limitation will be given effect to when a Scotch cautionary obligation is sued upon in another country. When a cautionary obligation entered into in another country is sued upon in Scotland, no such limitation is implied in the contract, and none will be enforced.[5]

[1] 11 Wheat. 361, 371, 372.

[2] 1837, 2 S. and M'L. 682.

[3] 1835, 2 Bing. New Ca. 202. Cf. *Watson* v. *Renton*, 1792, M. 4582; Bell's 8vo Ca. 92 (p. Lord-President Campbell).

[4] *Richardson* v. *Lady Haddington*, 6 March 1821, F. C.; 1824, 2 S. App. 406. Cf. *Smith* v. *Buchanan*, 1800, 1 East. 6.

[5] *Alexander* v. *Badenach*, 1843, 6 D. 322; *Scott* v. *Yuille*, 1831, 5 W. and S. 436.

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